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FLORIDA'S TROUBLED INLAND PROTECTION TRUST FUND: COMMON LAW ACTIONS AS ALTERNATIVE REMEDIES FOR AN INNOCENT BUYER OF CONTAMINATED COMMERCIAL LAND

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Of course, it is too much to expect that we shall have many judges like Lord Mansfield, with a vision broad enough to see the possibilities lying in the action of *assumpsit* . . . and with courage enough to keep the law abreast of the current ideas of morality and the needs of commerce. We must often be content, as best we may, with the little judges of narrow historical perspective and little grasp of principle, who tremble at a new decision and know no law for which cannot be found a precedent on all fours.¹

I. INTRODUCTION

A buyer of commercial real property faces many risks. These transactions are typically brimming with uncertainties: Does the sale price represent the fair market value? Will the property provide a sufficient stream of income to service the underlying debt? Will subsequent governmental regulations destroy the value of the property? Presumably, parties to a commercial property transaction take these uncertainties into account in reaching an agreed-upon sale price, and, for the most part, the parties' expectations are met. Recently, however, commercial property transactions have been burdened by an additional, and often unbargained-for, risk-petroleum or petroleum-based pollution.

Since liability for contaminated property is often predicated on ownership, a buyer of contaminated land may assume exorbitant, unbargained-for costs not reflected in the purchase price.² A seller's

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1. Arthur L. Corbin, *Quasi-Contractual Obligations*, 21 YALE L.J. 533, 540 (1912).

2. Clean-up costs can reach millions of dollars. For a discussion of the pervasiveness of the pollution problem and its attendant social and economic costs, see Kevin Duncan & B. Todd Bailey, *Innocence Amid "LUST": The Innocent Buyer and Leaking Underground Storage Tanks Containing Petroleum*, 7 B.Y.U. J. PUB. L. 245, 245-48 (1993); see also Comment, *Lust on Your Corner: Strict Liability, Victim Compensation, and Leaking Underground Storage Tanks*, 62 U. COLO. L. REV. 365, 365-78 (1991); J. Bruce Ehrenhaft, *Caught in the Web - As Hazardous Waste Liability Expands, "Second Parties" Face Liability in Association with Contaminated Realty*, FLA. B.J., Apr. 1989, 21, 21-27.

statutory liability to a buyer of contaminated property may include costs associated with site investigation and clean up,³ and the restoration of natural resources, including ground water.⁴ Further, a seller of contaminated land may be liable in tort.⁵ If the contaminants fall within the ambit of federal environmental laws,⁶ a buyer may have a private right of action against either the seller or another responsible party to recover the cost of cleaning up the property.⁷ Florida courts, in contrast, have not expressly recognized a private cause of action for buyers to recover the costs of cleaning up petroleum-based pollutants under Florida's environmental statutory laws.⁸ Moreover, in contrast to their treatment of residential property transactions,⁹ Florida courts permit a buyer of contaminated

3. See, e.g., 33 U.S.C. § 1321(f) (1988 & Supp. V 1993) (Federal Water Pollution Control Act [hereinafter *Clean Water Act*]); Fla. Stat. §§ 403.121, .131, .141 (1993).

4. 33 U.S.C. § 1321(f)(4).

5. Traditional tort liability for environmental damages includes nuisance, strict liability and negligence. See *infra* notes 31-89 and accompanying text.

6. The Comprehensive Environmental Response, Compensation and Liability Act [hereinafter CERCLA] applies to "hazardous substances" as defined in the statute. 42 U.S.C. § 9601(14). Petroleum-based contaminants are specifically excluded from CERCLA liability. *Id.* § 9607. Thus, a buyer of land contaminated with a petroleum-based substance may not, under CERCLA, seek reimbursement of clean-up costs. A recent federal circuit court of appeals case, however, found that the Resource Conservation and Recovery Act [hereinafter RCRA], 42 U.S.C. § 6972(a)(1)(B), provides an aggrieved buyer with a private cause of action to recover the cost of cleaning up petroleum-based contaminants. *KFC Western, Inc. v. Meghriq*, 49 F.3d 518 (9th Cir.), *cert. granted*, 116 S. Ct. 41 (1995). This case represents the first time that any court has found a private cause of action for damages under RCRA, which has generally been limited to providing injunctive relief. *Id.* Recently, the Eighth Circuit expressly disagreed with the KFC decision. *Furrer v. Brown*, 1995 WL 478274 (8th Cir. Aug. 15, 1995) (finding that "the [KFC] court began with a questionable proposition and then mistakenly reached its result in reliance on cases from this Circuit that, when carefully analyzed, do not support the KFC Western decision.").

7. 42 U.S.C. § 9607(a)(2)(B) (1988 & Supp. V 1993). See, e.g., *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1078 (1st Cir. 1986); *Walls v. Waste Resource Corp.*, 761 F.2d 311, 318 n.6 (6th Cir. 1985); *Marriott Corp. v. Simkins Indus., Inc.*, 825 F. Supp. 1575 (S.D. Fla. 1993); see also Jeffrey M. Gaba, *Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action Under CERCLA*, 13 *ECOLOGICAL Q.* 181, 183 (1986).

8. It is unclear whether a buyer of contaminated property has a cause of action to recover clean-up costs under Florida's environmental statutes. In *Mostoufi v. Presto Food Stores, Inc.*, 618 So. 2d 1372 (Fla. 2d DCA 1993), a buyer of contaminated commercial property sued a remote predecessor-in-title for the alleged loss in market value of the buyer's property due to contamination. In affirming the dismissal of the buyer's action, the court held that a cause of action for damages unconnected with the cleanup or removal of the pollutants was unavailable. Thus, the court did not rule out the viability of a claim for restitution for cleanup of pollutants. This approach would be consistent with CERCLA, which permits "any other person" besides the government to recover "any other costs of response" necessarily incurred during a cleanup performed in a manner "consistent with the National Contingency Plan." 42 U.S.C. § 9607(a)(2)(B) (1988 & Supp. V 1993). This article assumes the Florida courts would not construe Florida environmental laws to permit a buyer to have a cause of action to recover the cost of cleaning up contaminants.

commercial property to assert a common law cause of action against a seller only in certain circumstances.¹⁰ Consequently, in Florida, a buyer of commercial property contaminated with pollutants that are outside the scope of federal statutory law is likely to be saddled with the cost of cleaning up the property.

In limited circumstances, Florida law may provide a buyer a common law cause of action against a seller of contaminated land. Many buyers, however, forego litigation and finance cleanup costs by seeking reimbursement from Florida's Inland Protection Trust Fund (Trust Fund).¹¹ Created in 1986,¹² the Trust Fund is a repository for money that "enable[s] the [Department of Environmental Protection] to respond without delay to incidents of inland contamination related to the storage of petroleum and petroleum products in order to protect the public health, safety, and welfare and to minimize environmental damage."¹³

The Florida Legislature created the Trust Fund to expedite the remediation of petroleum-based contamination in hopes of avoiding cleanup delays that often occur when parties seek to sort out fault and liability through the judicial process.¹⁴ Money was available from the Trust Fund to reimburse both the Department of Environmental Protection (Department) and eligible landowners who voluntarily clean up their properties.¹⁵ The Trust Fund is supported by

9. See *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985) (holding that a seller of residential property has an affirmative duty to disclose to a buyer material defects of the property); see also *infra* notes 95-115 and accompanying text.

10. Several recent Florida district court of appeal decisions are instructive of the potential risks of liability assumed by a buyer of commercial property and the inability to seek recovery from the seller. See *Mostoufi*, 618 So. 2d at 1372; *Futura Realty v. Lone Star Bldg. Ctrs. (Eastern)*, Inc., 578 So. 2d 363 (Fla. 3d DCA 1991); *Sunshine Jr. Stores v. State Dep't of Env'tl. Reg.*, 556 So. 2d 1177 (Fla. 1st DCA 1990).

11. FLA. STAT. § 376.3071(12) (1993).

12. State Underground Petroleum Environmental Response Act of 1986, Ch. 86-159, § 15, 1986 Fla. Laws 655, 675.

13. FLA. STAT. § 376.3071(2) (1993).

14. FLA. STAT. § 376.3071(1)(c) (1993).

[W]here contamination of the ground or surface water has occurred, remedial measures have often been delayed for long periods [of time] while determinations as to liability and the extent of liability are made and that such delays result in the continuation and intensification of the threat to the public health, safety, and welfare; in greater damage to the environment; and in significantly higher costs to contain and remove the contamination.

Id.

15. FLA. STAT. § 376.3071(12)(a) (1993).

The legislature finds and declares that, in order to provide for rehabilitation of as many contamination sites as possible, as soon as possible, voluntary rehabilitation of contamination sites should be encouraged, provided that such rehabilitation is conducted in a manner and to a level of completion which will protect the public health, safety, and welfare and will minimize damage to the environment.

"penalties, judgments, recoveries, reimbursements, loans, and other fees and charges . . . and . . . [petroleum] excise tax revenues" ¹⁶ Recently, however, the number and timing of applications for reimbursement has resulted in a significant backlog that jeopardizes the continued solvency of the Trust Fund. ¹⁷

Florida Governor Lawton Chiles recognized the troubled state of the Trust Fund and issued an Executive Order in March 1995, directing the Department to

cease processing applications of reimbursement of funds for site rehabilitation work on sites eligible for state-funded cleanup pursuant to Sections 376.305(6), 376.305(7), 376.3071(9), and (12), 376.3072, and 376.3073, Florida Statutes, except for those applications for sites with priority ranking scores equal to or greater than 50 points pursuant to Chapter 62-771, Florida Administrative Code and approved by the Department [of Environmental Protection] prior to the start of work. ¹⁸

The governor subsequently signed into law a bill passed by the Florida Legislature in March 1995 that contained language similar to that found in his executive order. The bill limited reimbursement to restitution work done prior to March 27, 1995, ¹⁹ and future rehabilitation work will be reimbursed only if approved by the Department prior to cleanup. ²⁰ The future viability of the Trust Fund is currently unclear. At the close of its 1995 session, the Florida Legislature failed to pass a bill providing for needed reform of the Trust Fund's administrative procedures. ²¹ Thus, many rehabilitation projects in Florida stand idle as landowners and contractors await the outcome.

Id.

16. FLA. STAT. § 376.3071(3) (1993).

17. See, Ch. 95-2, § 1, 1995 Fla. Laws; Fla. Exec. Order No. 95-82 (March 8, 1995). The Trust Fund is currently supported by yearly credits amounting to approximately \$160 million. The Department estimates, however, that its current backlog of unpaid reimbursement claims is \$212 million, with a projected increase to \$420 million as additional claims (representing current work in progress) are submitted. Prakash Gandhi, *Lawmakers Weigh UST Cleanup Options*, FLORIDA SPECIFIER, May 1995, at 2.

The reimbursement claim approval process also contributes to the Trust Fund's current crisis. Department officials rank contaminated sites based on the degree of threat to public health. See Fla. Admin. Code Ann. r. 62-771 (1995). Applications for reimbursement submitted to the Trust Fund, however, are received without regard to the site's impact on human health or the environment. See Fla. Admin. Code Ann. r. 62-773.700 (1995). Consequently, there is a risk that a large number of claims from low priority sites could deplete the Trust Fund, or otherwise jeopardize its solvency, while high priority sites go untouched and continue to threaten public health.

18. Fla. Exec. Order No. 95-82, § 2 (March 8, 1995).

19. Ch. 95-2, § 1, 1995 Fla. Laws.

20. *Id.*

21. Two suggested reforms were debated by the Legislature. One option would do away with the Trust Fund reimbursement program and "replace it with a petroleum contamination

Since 1986, the Trust Fund has been a solution to the problem of how private parties and state government finance the rehabilitation of contaminated property. However, given the Trust Fund's uncertain future, alternative financing solutions must be examined to continue to advance Florida's policy of expediting the cleanup of contaminated land to protect public health and the environment.

This article identifies and examines common law substantive and remedial obstacles encountered by a buyer of contaminated commercial property and discusses an alternative theory of relief untested in Florida courts—restitution. First, the author surveys traditional common law torts and criticizes current Florida law that generally precludes a buyer of contaminated property from seeking relief in tort from the seller.²² The article then provides a general introduction to the law of restitution²³ and examines unjust enrichment and its potential to provide relief to a buyer.²⁴ The article concludes that, in light of the Trust Fund's uncertain future, the Legislature should provide a statutory cause of action for restitution of cleanup costs. In the absence of such legislation, however, aggrieved buyers should press the Florida courts to revisit and reassess the rationale of their prior decisions barring relief in tort to buyers of polluted commercial property. Finally, in the event *stare decisis* prevails, aggrieved parties should consider restitution as an alternative source of relief.²⁵

II. TRADITIONAL THEORIES OF RELIEF IN TORT

Tort law provides a remedy to a person who sustains an injury to a legally recognized interest.²⁶ A landowner whose property has been contaminated by another may be able to recover in tort under theories of nuisance,²⁷ negligence²⁸ or strict liability.²⁹ Florida courts, however, generally limit application of these tort theories to cases where the buyer had title to the property at the time of the contamination. These tort actions usually are not available to a buyer of property contaminated by the seller because, the courts hold, at the time of the pollution the seller did not owe a legal duty

amnesty program." See Gandhi, *supra* note 17, at 2. The other option would eliminate the reimbursement program and replace it with a quasi-governmental corporate entity to administer the cleanup program. *Id.*

22. See *infra* notes 26-115 and accompanying text.

23. See *infra* notes 116-151 and accompanying text.

24. See *infra* notes 159-215 and accompanying text.

25. See *infra* notes 216-243 and accompanying text.

26. See *infra* notes 120-121 and accompanying text.

27. See *infra* notes 31-49 and accompanying text.

28. See *infra* notes 50-70 and accompanying text.

29. See *infra* notes 71-89 and accompanying text.

to the buyer. Consequently, a buyer is left to pursue an action not based on the contamination itself, but on the sales transaction between buyer and seller—an action in fraud or misrepresentation.³⁰ Florida courts, however, limit the availability of a commercial property buyer's fraud claim against a seller. This section provides a critical review of the Florida courts' application of the aforementioned tort theories to an aggrieved buyer of contaminated commercial property.

A. Nuisance

In Florida, a nuisance action is unlikely to provide a buyer with a cause of action against a seller for conditions existing on the land prior to the sale. Nuisance is defined as the unreasonable interference with another's use and enjoyment of land.³¹ "The law of nuisance plys [sic] between two antithetical extremes: The principle that every person is entitled to use his property for any purpose that he sees fit, and the opposing principle that everyone is bound to use his property in such a manner as not to injure the property or rights of his neighbor."³² A person may be liable for maintaining a nuisance while in possession of the property, and the landowner may continue to be liable for the nuisance after the property is transferred to another. The class of potential defendants, however, is limited to those who could have brought an action when the wrongdoer was in possession.³³ Therefore, while a seller of polluted property may be

30. See *infra* notes 90-115 and accompanying text. Fraud is used hereinafter in reference to either misrepresentation or fraud.

31. RESTATEMENT (SECOND) OF TORTS § 821D (1966). The Restatement defines "private nuisance" as "a nontrespassory invasion of another's interest in the private use and enjoyment of land." See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 87 (5th ed. 1984) [hereinafter PROSSER]; Florida E. Coast Properties, Inc. v. Metropolitan Dade County, 572 F.2d 1108 (11th Cir. 1978); State ex rel. Pettengill v. Copeland, 466 So. 2d 1133 (Fla. 1st DCA 1985); § 386.041, Fla. Stat. (1993)(defining "nuisance injurious to health"). This article is limited to discussing private nuisance. For a discussion of the relationship between private and public nuisance, see PROSSER, *supra* § 90. See also *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970).

32. *Beckman v. Marshall*, 85 So. 2d 552, 554 (Fla. 1956) (quoting with approval *Antonick v. Chamberlain*, 78 N.E.2d 752, 758 (Ohio Ct. App. 1947)).

33. RESTATEMENT (SECOND) OF TORTS § 840(a) (1966). The general rule regarding a seller's continuing exposure to liability for maintaining a nuisance after transferring property is:

(1) A [seller] of land upon which there is a condition involving a nuisance for which he would be *subject to liability if he continued in possession* remains subject to liability for the continuation of the nuisance after he transfers the land.

(2) If the [seller] has created the condition or has actively concealed it from the [buyer] the liability stated in Subsection (1) continues until the [buyer] discovers the condition and has reasonable opportunity to abate it. Otherwise liability continues only until the [buyer] has had reasonable opportunity to discover the condition and abate it.

subject to a nuisance action, a buyer of the property is usually not a member of the class to whom the seller may be liable.³⁴

*Philadelphia Electric Company v. Hercules*³⁵ is the principal case addressing the issue of whether a seller who has created and maintained a nuisance is liable to a buyer for damages. Philadelphia Electric Company (PECO) sued Hercules, a remote seller, for costs to remediate the contamination and to remove the pollutants³⁶ discharged from a chemical plant operated by Hercules' predecessor-in-interest.³⁷ Hercules argued it was immune from liability under the doctrine of caveat emptor.³⁸ The court agreed with Hercules regarding the caveat emptor defense and rejected PECO's nuisance claim, finding that the complaint did not follow traditional policies of nuisance law.³⁹ The court noted that nuisance has historically been used as "a means of efficiently resolving conflicts between neighboring, contemporaneous land uses,"⁴⁰ and opined that a contrary holding would upset the allocation of risks between seller and

Id. (emphasis added).

34. An exception to that rule is where the prospective vendee is an existing neighbor. Liability, however, would be limited to those harms visited upon the neighboring property. See *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 314 n.8 (3d Cir.), *cert. denied*, 474 U.S. 980 (1985).

35. 762 F.2d 303 (3d Cir. 1985).

36. In contrast to an action for diminution in value of property. *Id.* at 306.

37. *Hercules*, 762 F.2d at 307-08. The nuisance was actually created by Hercules' predecessor-in-interest, but in its acquisition agreement, Hercules expressly assumed "all of the debts, obligations and liabilities" of its predecessor. *Id.* at 309.

38. Traditionally, sellers have invoked the doctrine of caveat emptor to avoid liability in contract for a "bad bargain." The doctrine has also been used to avoid tort liability for injuries caused by transferred property. "Comment a" of section 352 of the *Restatement (Second) of Torts* provides the traditional view regarding caveat emptor and the transfer of land:

Under the ancient doctrine of caveat emptor, the original rule was that, in the absence of express agreement, the [seller] of land was not liable to his [buyer], or a fortiori to any other person, for the condition of the land existing at the time of transfer. As to sales of land this rule has retained much of its original force, and the implied warranties which have grown up around the sale of chattels never have developed. This is perhaps because great importance always has been attached to the deed of conveyance, which is taken to represent the full agreement of the parties, and to exclude all other terms and liabilities. The [buyer] is required to make his own inspection of the premises, and the [seller] is not responsible to him for their defective condition, existing at the time of transfer.

"Absent an express agreement, a material misrepresentation or active concealment of a material fact, the seller cannot be held liable for any harm sustained by the buyer or others as the result of a defect existing at the time of the sale." *Haskell Co. v. Lane Co.*, 612 So. 2d 669, 671 (Fla. 1st DCA 1993). For a thorough historical treatment of the doctrine of caveat emptor, see Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931). Professor Hamilton's article traces the doctrine from biblical times up through the 20th century. *Id.*

39. *Philadelphia Elec. Co. v. Hercules*, 762 F.2d 303, 314 (3d Cir. 1985).

40. *Id.*

purchaser, which had already been apportioned under the doctrine of caveat emptor.⁴¹

Although there are no reported Florida cases addressing the precise issue of whether a seller may be liable to a buyer for maintaining a nuisance upon the purchased land, several cases are instructive. In *Beckman v. Marshall*,⁴² an oft-cited Florida nuisance case, the court expressly refers to the coexisting rights and obligations among neighbors: the right to be free from unreasonable interference with the use and enjoyment of one's property and the obligation to exercise these rights reasonably.⁴³ These expectations are absent from the usual seller-buyer relationship. A recent Florida case, *Futura Realty v. Lone Star Building Centers (Eastern), Inc.*,⁴⁴ noted the distinction between the scope of a landowner's duty to a neighbor and to a buyer. The court found that a buyer is afforded various protections unavailable to a neighbor. The buyer can inspect the property and, if damaged or likely to be damaged, negotiate the price accordingly,⁴⁵ or, in the alternative, simply walk away from the transaction.⁴⁶ In contrast, a neighbor is afforded none of these options and, consequently, the law intervenes and expands the duty to appropriately shift the expense of those burdens imposed by a landowner.⁴⁷

Thus, Florida courts view the rights and obligations between landowners, at least with respect to strict liability, in terms of geography as opposed to time. Potential plaintiffs are recognized because of their geographic proximity to the defendant's property, not because of their temporal relationship with the defendant.⁴⁸ This notion of a geographical basis for liability is consistent with the holding in *Hercules*.⁴⁹ The usual buyer and seller relationship is not geographical, it is temporal; a buyer typically does not occupy the space defining the limits of a seller's nuisance liability. Consequently, in

41. *Id.*

42. 85 So. 2d 552 (Fla. 1956).

43. *Id.* at 554.

44. 578 So. 2d 363 (Fla. 3d DCA 1991) (involving a buyer who brought a strict liability claim against a seller); *contra* T & E Industries, Inc. v. Safety Light Corp., 587 A.2d 1249 (N.J. 1991). See *infra* notes 79-81 and accompanying text.

45. *Futura Realty*, 578 So. 2d at 365.

46. *Id.*

47. *Philadelphia Elec. Co. v. Hercules*, 762 F.2d 303, 313 (3d Cir. 1985). "Neighbors, unlike the purchasers of land upon which a nuisance exists, have no opportunity to protect themselves through inspection and negotiation." *Id.* See generally Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973); Comment, *Internalizing Externalities: Nuisance Law and Economic Efficiency*, 53 N.Y.U. L. REV. 219 (1978).

48. *Id.*

49. *Id.*

Florida, a buyer is unlikely to recover from a seller for damages to the transferred property under a theory of nuisance.

B. Negligence

Negligence is the failure of a person's conduct to meet community standards of reasonable care. Negligent conduct will give rise to liability when the conduct results in injury to another person.⁵⁰ A cause of action for negligence exists when: (1) the defendant has a duty to meet a certain standard of conduct with respect to the plaintiff; and (2) the defendant's failure to meet the standard is the proximate cause-in-fact of injury to the plaintiff causing damage.⁵¹

The standard of conduct to which most individuals are held is often expressed as that of a reasonable person.⁵² Special rules⁵³ govern the actionability of a landowner's⁵⁴ conduct. The extent to which a landowner must exercise reasonable care depends on the landowner's relationship with the plaintiff.⁵⁵ Further, the scope of a landowner's duty to exercise reasonable care depends on whether

50. See PROSSER, *supra* note 31, § 30. See also RESTATEMENT (SECOND) OF TORTS § 281 (1965) ("The actor is liable for an invasion of an interest of another if: (a) the interest invaded is protected against unintentional invasion, and (b) the conduct of the actor is negligent with respect to the other, or a class of persons within which he is included, and (c) the actor's conduct is a legal cause of the invasion, and (d) the other has not so conducted himself as to disable himself from bringing an action for such invasion."). RESTATEMENT (SECOND) OF TORTS § 281(a), (b) relate to the defendant's failure to exercise reasonable care or otherwise meet a community's standard of care. Section 281(c), (d) tie in the causation element and the notion that a defense may be available to a defendant. RESTATEMENT (SECOND) OF TORTS § 281 cmt. a, b (1965).

51. *Id.* See also *Paterson v. Deeb*, 472 So. 2d 1210 (Fla. 1st DCA 1985) (setting out the four elements of nuisance as (1) a legal duty owed by defendant to plaintiff; (2) breach of that duty; (3) injury to the plaintiff caused by such breach; and (4) damages as a result of that injury).

52. See Restatement (Second) of Torts § 283 (1965); Prosser, *supra* note 31, § 32.

53. Chapter 13 of the RESTATEMENT (SECOND) OF TORTS §§ 328E-387 (1965), is entitled "Liability for Condition and Use of the Land." The chapter is divided into eight topics which provide rules on the standard of care, under various circumstances, to which an owner and occupier of land is expected to conform. See PROSSER, *supra* note 31, § 64.

54. The *Restatement* makes reference to both owners and occupiers to whom these special rules apply. Prosser writes:

Largely for historical reasons, the rights and liabilities arising out of the condition of land, and activities conducted upon it, have been concerned chiefly with the possession of the land, and this has continued into the present day. This development has occurred for the obvious reason that the person in possession of property ordinarily is in the best position to discover and control its dangers, and often is responsible for creating them in the first place.

PROSSER, *supra* note 31, § 57. A tenant-in-possession may be required to exercise the same degree of care as a landowner. See, e.g., *Arias v. State Farm Fire & Casualty Co.*, 426 So. 2d 1136 (Fla. 1st DCA 1983).

55. The law recognizes four potential relationships: visitor, invitee, licensee and trespasser. Further, the law carves out a special rule for children coming upon one's land. See PROSSER, *supra* note 31, §§ 57-64.

the potential plaintiff is on or off the defendant's property.⁵⁶ A buyer's injury would consist of damages to the conveyed property and possibly to the buyer as well. Accordingly, this section examines the rules that define the scope of the liability of sellers and other transferors of land to persons on the land⁵⁷ conveyed.

In the buyer-seller context, liability exists when the parties owe a duty to one another to exercise reasonable care and when one party breaches that duty, causing an injury to the other party. The traditional rule is that a seller is not liable to the buyer for damages caused by either a natural or artificial condition existing upon the property at the time of the conveyance.⁵⁸ This rule is founded principally upon the doctrine of caveat emptor.⁵⁹ The law thrusts upon a buyer the responsibility of investigating the condition of the property, and if the buyer fails to do so, the buyer must take the property as is.⁶⁰ In the absence of an express agreement, material misrepresentation or fraudulent concealment, a seller is under no duty to disclose to a buyer information about the condition of property.⁶¹

An exception to the traditional rule is that a seller may have a duty to disclose to a buyer the existence of an unreasonably dangerous condition.⁶² In the context of land contamination, this exception

56. RESTATEMENT (SECOND) OF TORTS §§ 363-379 (1965).

57. RESTATEMENT (SECOND) OF TORTS ch. 13, topic 2 (1965).

58. RESTATEMENT (SECOND) OF TORTS § 352 (1964).

[I]n the absence of express agreement or misrepresentation, the purchaser is expected to make his own examination and draw his own conclusions as to the condition of the land; and the vendor is, in general, not liable for any harm resulting to him or others from any defects existing at the time of transfer.

PROSSER, *supra* note 31, § 64. This proposition has been applied in Florida to both the sale and lease of real property. See, e.g., *Brooks v. Peters*, 25 So. 2d 205 (Fla. 1946) (lease); *Ramel v. Chasebrook Constr. Co.*, 135 So. 2d 876 (Fla. 2d DCA 1961) (sale).

59. See *supra* note 38; *infra* notes 95-115 and accompanying text. But see *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985) (holding that a seller of a residential home has a duty to disclose material defects affecting the value of the property).

60. "[B]uyers are expected 'to fend for themselves, protected only by their own skepticism as to the value and condition of the subject of the transaction.' . . . In other words, every purchase is a gamble." *Haskell Co. v. Lane Co.*, 612 So. 2d 669, 671 (Fla. 1st DCA 1993) (quoting Note, *Real Property - Sellers' Liability for Nondisclosure of Real Property Defects* - *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985), 14 FLA. ST. U. L. REV. 359, 361 (1986)). See also *United States v. Price*, 523 F. Supp. 1055 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982); *United States v. Vertac Chemical Corp.*, 489 F. Supp. 870, 877 (E.D. Ark. 1980).

61. See *Haskell*, 612 So. 2d at 671. But see *Johnson*, 480 So. 2d at 625 (holding that a seller has a duty to disclose to a buyer known facts materially affecting the value of the property which are not readily observable). In *Futura Realty v. Lone Star Bldg. Ctrs. (Eastern), Inc.*, 578 So. 2d 363 (Fla. 3d DCA 1991), the court read *Johnson* as imposing a duty of disclosure only upon sellers of residential property, holding that with respect to commercial land transactions a seller is under no such obligation.

62. Restatement (Second) of Torts § 353 (1965).

(1) A [seller] of land who conceals or fails to disclose to his [buyer] any condition, whether natural or artificial, which involves unreasonable risk to persons on the

has been narrowly construed to apply only to those instances "where physical harm is caused to a person, and possibly to the property itself, not where the claim is for [a] pecuniary loss."⁶³ The courts seem more comfortable providing relief for damage to people rather than property. Recovery for damages to the conveyed property may be limited to those post-sale damages caused by a pre-conveyance discharge; that is, damages caused by migration of the pollutants after the buyer acquires title.⁶⁴ Damages for cleanup of the pre-conveyance discharge or for damages accruing before the property was conveyed appear unrecoverable under *Restatement (Second) of Torts* § 353 (1965).⁶⁵

Notwithstanding the limited utility of section 353, Florida courts have not adopted the section. In *Haskell Company v. Lane Company*,⁶⁶ the court rejected a plaintiff's negligence claim based on section 353. Finding section 353 not expressly adopted by a Florida appellate court, the *Haskell* court refused to do so itself and certified the following question to the Florida Supreme Court: "Should the common law doctrine of caveat emptor continue to apply to commercial real property transactions; and, if not, with what legal principles should it be replaced?"⁶⁷

The appeal before the Florida Supreme Court, however, was dismissed.⁶⁸ Thus, caveat emptor was not added to "the trash heap of

land, is subject to liability to the [buyer] and others upon the land with the consent of the [buyer] . . . for physical harm caused by the condition after the [buyer] has taken possession, if

(a) the [buyer] does not know or have reason to know of the condition or the risk involved, and

(b) the [seller] knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the [buyer] will not discover the condition or realize the risk.

(2) If the [seller] actively conceals the condition, the liability stated in Subsection (1) continues until the [buyer] discovers it and has reasonable opportunity to take effective precautions against it. Otherwise the liability continues only until the [buyer] has had reasonable opportunity to discover the condition and to take such precautions.

Id.

63. Portsmouth Redevelopment & Hous. Auth. v. BMI Apartments Assocs., 847 F. Supp. 380, 389 (E.D. Va. 1994).

64. The author has found no authority either supporting or opposing this view.

65. The availability of a remedy under section 353 may be further proscribed because subsection (1) expressly precludes liability if a buyer knows or has reason to know of the unreasonably dangerous condition at the time of the conveyance. See *Amland Properties Corp. v. ALCOA*, 711 F. Supp. 784, 809 (D.N.J. 1989).

66. 612 So. 2d 669 (Fla. 1st DCA 1993).

67. *Id.* at 676.

68. See also *Green Acres, Inc. v. First Union Nat'l Bank*, 637 So. 2d 363 (Fla. 4th DCA 1994) (stating that the procedural posture of the case prevented the court from certifying a similar question after the *Haskell* dismissal).

discarded legal doctrines and rules."⁶⁹ While the question posed by the First District Court of Appeal remains unanswered, Florida courts continue to apply caveat emptor to dismiss negligence claims arising out of commercial real property transactions.⁷⁰

In sum, a seller of commercial property in Florida has no affirmative duty to disclose to a buyer dangerous conditions existing upon the land at the time of the conveyance. Thus, a buyer of contaminated property is unlikely to recover in a negligence action damages for physical harm to person or property, diminution in value of the property, or cleanup costs.

C. Strict Liability

The landmark case of *Rylands v. Fletcher*⁷¹ held that a person is strictly liable for injuries arising from the creation and maintenance of abnormally dangerous conditions and activities.⁷² Recently, buyers of real property have, with some success,⁷³ proffered the rule as a basis for liability against a seller of contaminated property. *Rylands* is reflected in the *Restatement (Second) of Torts* § 519 (1964):

- (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
- (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.⁷⁴

The phrase "abnormally dangerous activity" has been subject to various interpretations.⁷⁵ The interpretation that has emerged in the United States is that a court should examine and balance a number of

69. *Haskell Co.*, 612 So. 2d at 676.

70. See *supra* note 61.

71. 3 H.L. 330 (1868).

72. PROSSER, *supra* note 31, § 78. Although the following situations occurred outside of the buyer-seller context, examples of conditions and activities to which the rule has been applied . . . include water collected in quantity in a dangerous place, or allowed to percolate; explosives or inflammable liquids stored in quantity in the midst of a city; blasting; pile driving; crop dusting; the fumigation of part of a building with cyanide gas; drilling oil wells or operating refineries in thickly settled communities; an excavation letting in the sea; factories emitting smoke, dust or noxious gases and other toxic wastes in the midst of a town; roofs so constructed as to shed snow into a highway; and a dangerous party wall. *Id.*

73. See *T & E Indus., Inc. v. Safety Light Corp.*, 546 A.2d 570 (N.J. Super. Ct. App. Div. 1988), *aff'd*, 587 A.2d 1249 (N.J. 1991); and *infra* notes 79-81 and accompanying text.

74. RESTATEMENT (SECOND) OF TORTS § 519 (1964).

75. See PROSSER, *supra* note 31, § 78. After the *Rylands v. Fletcher* decision, the English courts applied strict liability principles to conditions and activities in the context in which they arose. For example, the use of dynamite in a rock quarry is likely to be considered less hazardous than its use in a crowded city. *Id.*

factors to determine whether an activity or condition is abnormally dangerous or, in the words of the American Law Institute, *ultra-hazardous*.⁷⁶ A recent New Jersey case⁷⁷ spurred renewed debate, assessment and examination of the principles underlying the rule in *Rylands*⁷⁸ when it applied strict liability principles to the context of a buyer-seller of real property.

In *T & E Industries, Inc. v. Safety Light Corporation*,⁷⁹ a New Jersey intermediate appellate court departed from the traditional application of strict liability to injuries inflicted upon the person, property or land of another and extended the doctrine to provide a remedy to a buyer who discovers the presence of hazardous wastes or other pollutants upon the purchased property. The court's reasoning behind its extension of the traditional rule in favor of a buyer of contaminated land, however, was cursory and unsatisfactory. Noting that the plaintiff was an innocent buyer without notice of the hazardous waste, the court wrote: "We see no practical or legal distinction between the rights of a successor in title to use and enjoy

76. RESTATEMENT (SECOND) OF TORTS § 520 (1964). This section provides that the following factors should be taken into account:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

Id. See also *City Serv. Co. v. State*, 312 So. 2d 799 (Fla. 2d DCA 1975) (holding that Ultra-hazardous activity "necessarily involves a risk of serious harm to the person, land, or chattels of others or cannot be eliminated by the exercise of the utmost care, and is not a matter of common usage."). In Florida the factors to be considered in determining whether an activity is ultrahazardous are: (1) whether the activity involves a high degree of risk of harm to the property of others; (2) whether the potential harm is likely to be great; (3) whether the risk can be eliminated by the exercise of reasonable care; (4) whether the activity is a matter of common usage; (5) whether the activity is appropriate to the place where it is conducted; and (6) whether the activity has substantial value to the community. *Old Island Fumigation, Inc. v. Barbee*, 604 So. 2d 1246 (Fla. 3d DCA 1992); *Great Lakes Dredging & Dock Co. v. Sea Gull Operating Corp.*, 460 So. 2d 510 (1984).

77. *T & E Industries, Inc. v. Safety Light Corp.*, 546 A.2d 570 (N.J. Super. Ct. App. Div. 1988), *aff'd*, 587 A.2d 1249 (N.J. 1991).

78. See William B. Johnson, *Common-Law Strict Liability in Tort of Prior Landowner or Lessee to Subsequent Owner for Contamination of Land with Hazardous Waste Resulting from Prior Owner's or Lessee's Abnormally Dangerous or Ultrahazardous Activity*, 13 A.L.R. 600 (5th ed. 1993); Jim C. Chen & Kyle E. McSillarow, *Application of the Abnormally Dangerous Activities Doctrine to Environmental Cleanups*, 47 BUS. LAW. 1031 (1992); and Comment, *The Rylands v. Fletcher Doctrine in America: Abnormally Dangerous, Ultrahazardous, or Absolute Nuisance?*, 1978 ARIZ. ST. L.J. 99 (1978) (opining that the doctrine should be extended to subsequent landowners). See also *Amland Properties Corp. v. ALCOA*, 711 F. Supp. 784 (D.N.J. 1989).

79. 546 A.2d 570 (N.J. Super. Ct. App. Div. 1988).

its land and the rights of a neighboring property owner. Both have rights and both can suffer injury through the acts of a prior owner."⁸⁰

Further, the court rejected the seller's caveat emptor defense, finding that application of the doctrine to bar the buyer's recovery was inconsistent with contemporary standards of fairness and reasonableness.⁸¹ This perfunctory analysis by the court quite possibly led to its rejection in a subsequent Florida case.⁸²

In *Futura Realty v. Lone Star Building Centers (Eastern), Inc.*,⁸³ a buyer of commercial property sued⁸⁴ on a theory of strict liability for damages caused by a prior owner's disposal of various chemicals.⁸⁵ Citing the language quoted above by the court in *T & E Industries*, the Florida Third District Court of Appeal rejected the buyer's strict liability argument. The *Futura* court, adopting the reasoning of a federal district court in Massachusetts,⁸⁶ held that strict liability is limited to those situations where a landowner's ultrahazardous activity harms an adjoining landowner.⁸⁷

In sum, while neither the Florida Supreme Court nor other Florida appellate courts have addressed a buyer's strict liability claim against a seller, the rule in the Third District is that if a landowner maintains an ultrahazardous condition or activity that damages the landowner's property, the owner is not strictly liable to a subsequent

80. *Id.* at 576-77.

81. *Id.* at 577.

82. *Futura Realty v. Lone Star Bldg. Ctrs. (Eastern) Inc.*, 578 So. 2d 363 (Fla. 3d DCA 1991).

83. 578 So. 2d 363 (Fla. 3d DCA 1991).

84. In *Futura*, the buyer sued two parties: (1) the seller of the contaminated property, under a theory of fraud for failure to disclose the presence of the pollution, *see infra* notes 88-113 and accompanying text; and (2) a remote predecessor-in-title, allegedly responsible for the discharge, under a theory of strict liability. *Id.*

85. *Id.* at 364.

86. *Id.* at 365. *See Wellesley Hills Realty Trust v. Mobil Oil Corp.*, 747 F. Supp. 93 (D. Mass. 1990). In *Wellesley*, the buyer sued the seller, Mobil Oil Corp., for the cost of cleaning up oil and hazardous materials allegedly discharged while the seller operated a gasoline service station upon the property. *Id.* at 94. Among the proffered theories of recovery, the buyer argued that the seller was strictly liable under *Rylands v. Fletcher*. While acknowledging that "the operation of a gas station qualified as an abnormally dangerous activity . . ." the court nevertheless rejected the buyer's strict liability argument because, as it viewed *Rylands*, liability had always been predicated on injury to the property or person of another. *Id.* at 101. In *Wellesley*, the court held that since the seller owned the damaged property at the time of the discharge, the seller could not be liable to a subsequent buyer of the contaminated property. That court reasoned that "[i]t would be nonsensical to even formulate a rule that an actor is strictly liable for harm inflicted on his or her own property or person." *Id.* at 102. *Accord* *John Boyd Co. v. Boston Gas Co.*, 775 F. Supp. 435 (D. Mass. 1991); *Rosenblatt v. Exxon Co.*, 642 A.2d 180 (Md. 1994).

87. *Futura*, 578 So. 2d at 365.

buyer of the property.⁸⁸ The class of potential plaintiffs to which a seller may be liable is limited to adjoining landowners and has not been expanded to include a buyer of the property.⁸⁹

D. Fraud and Misrepresentation

Though often thought of as an action in contract, a material or fraudulent misrepresentation may also be actionable in tort.⁹⁰ The elements of the tort action of fraud are:

- (1) a false statement concerning a material fact;
- (2) the representor's knowledge that the representation is false;
- (3) an intention that the representation induce another to act on it; and
- (4) consequent injury by the party acting in reliance on the representation.⁹¹

88. The rule is premised upon the presumption that a vendee can protect itself by inspecting the property prior to conveyance, negotiating the price to take into account possible contamination, etc., means unavailable to a neighboring land owner. *Id.*

89. After the *Wellesley* and *Futura* decisions, the New Jersey Supreme Court affirmed the extension of the *Rylands* rule to the seller-buyer of land context. *T & E Indus., Inc. v. Safety Light Corp.*, 587 A.2d 1249 (N.J. 1991). In contrast to the unsatisfying reasoning of the intermediate court's opinion, the New Jersey Supreme Court closely examined *Rylands* and found that its policy underpinnings were: (1) that a person should bear the direct and ancillary costs of producing a product or a service which requires the maintenance of an ultrahazardous activity; and (2) that person is best able to absorb the costs because they can be offset by revenues. *Id.* at 1257. The court concluded that since neither of these policy principles were related to property rights, "liability for the harm caused by abnormally dangerous activities does not necessarily cease with the transfer of property." *Id.* at 1257. Given that the *Futura* court was unable to consider this rationale, it remains to be seen whether, in the future, a Florida court might embrace the New Jersey Supreme Court's view of *Rylands v. Fletcher* and its attendant policies. *But see Hydro-Mfg., Inc. v. Kayser-Roth Corp.*, 640 A.2d 950 (R.I. 1994) (applying the holding in *Futura* and *Wellesley Hills*).

90. *See, e.g., Hauser v. Van Zile*, 269 So. 2d 396 (Fla. 4th DCA 1972). The type of action, whether tort or contract, is determined by which posture the plaintiff wishes to take with respect to the contract. If the buyer wants to rescind the contract, the buyer may do so by raising misrepresentation as a defense in a subsequent action to enforce the contract. If, however, a plaintiff affirms the existence of a contract or otherwise continues to perform under the contract, the plaintiff is precluded from a contract remedy and must seek a remedy in tort. *Id.* *See also* E. ALLAN FARNSWORTH, *CONTRACTS* § 4.15 (2d ed. 1990).

91. *Johnson v. Davis*, 480 So. 2d 625, 627 (Fla. 1985); *Huffstetler v. Our Home Life Ins. Co.*, 65 So. 1 (Fla. 1914); *Thor Bear v. Crocker Mizner Park, Inc.*, 648 So. 2d 168 (Fla. 4th DCA 1994); *Eastern Cement v. Halliburton Co.*, 600 So. 2d 469 (Fla. 4th DCA 1992).

Recently, the courts have held that the knowledge element of fraud may be satisfied in one of three ways. A plaintiff demonstrates knowledge if it proves:

- (1) the defendant had actual knowledge of the untruthfulness of the statement; or
- (2) the defendant uttered the statement knowing the defendant had no knowledge of either the statement's truth or falsity; or
- (3) the false statement was made under circumstances where the defendant should have known, if he did not know, of its falsity.

In the absence of a fraudulent or material misstatement of fact, a person's knowing nondisclosure, in limited circumstances, may give rise to an action for fraud where there is a duty to disclose.⁹² The traditional rule with respect to real property transactions is that a seller has no duty to disclose material facts that affect the value of the property, even if unknown to the buyer.⁹³ A seller was liable only for affirmative misrepresentations; mere nonfeasance was not actionable. The buyer bore the burden and risk of any defects or hidden facts materially affecting the land's value.⁹⁴

In *Johnson v. Davis*,⁹⁵ however, the Florida Supreme Court retreated from the traditional rule and held that "where the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer."⁹⁶ The seller's

See *Thor Bear*, *supra*; *Sherban v. Richardson*, 445 So. 2d 1147 (Fla. 4th DCA 1984).

92. RESTATEMENT (SECOND) OF TORTS § 551 (1965). The section provides:

(1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, *if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.*

(2) One party to business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

(a) matters known by him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and

(b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and

(c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and

(d) the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and

(e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

Id. (emphasis supplied). See *Gutter v. Wunker*, 631 So. 2d 1117 (Fla. 4th DCA 1994) (showing a duty to disclose in an attorney-client relationship); *Kovach v. McLellan*, 564 So. 2d 274, 280-81 (Fla. 5th DCA 1990) (Sharp, J., dissenting) (involving a duty to disclose in a lender-borrower relationship).

93. See, e.g., *Ramel v. Chasebrook Constr. Co.*, 135 So. 2d 876 (Fla. 2d DCA 1961).

94. See *Banks v. Salina*, 413 So. 2d 851 (Fla. 4th DCA 1982).

95. 480 So. 2d 625 (Fla. 1986).

96. *Id.* at 629. The *Johnson* court cited *Lingsch v. Savage*, 29 Cal. Rptr. 201 (Ct. App. 1963), in support of its holding. *Lingsch* set out the elements for failure to disclose as follows:

(1) Nondisclosure by the defendant of facts materially affecting the value or desirability of the property;

(2) Defendant's knowledge of such facts and of their being unknown to or beyond the reach of the plaintiff;

(3) Defendant's intention to induce action by the plaintiff;

(4) Inducement of the plaintiff to act by reason of nondisclosure; and

duty to disclose known facts, announced in *Johnson*, is illustrative of the decline of caveat emptor in contemporary jurisprudence.⁹⁷ The Florida Supreme Court's holding in *Johnson* thrusts additional rights and obligations upon a seller of property, and courts increasingly examine whether a transaction comports with contemporary notions of fair dealing.

In *Futura*,⁹⁸ however, the Third District Court of Appeal refused to extend a seller's duty to disclose material facts affecting the value of property to commercial real estate transactions.⁹⁹ The *Futura* court based its decision on two findings: (1) the *Johnson* court never referred to the duty to disclose as extending to commercial property transactions; and (2) the *Johnson* court, in reaching its decision, did not cite to any cases involving the sale of commercial property.¹⁰⁰ The *Futura* court's refusal to extend a duty to disclose to commercial property transactions is based upon a narrow reading of *Johnson*. *Futura* failed, contrary to the court's opinion, to contextually examine the *Johnson* court's opinion to understand its basis.¹⁰¹ A closer examination of the reasoning in *Johnson* supports the proposition that a seller of commercial property has a duty to disclose known facts materially affecting property value.

The buyer in *Johnson* sued under theories of breach of contract, fraud and misrepresentation.¹⁰² The court found that the seller made

(5) Resulting damages.

Id. at 206.

97. See Robert M. Morgan, *The Expansion of the Common Law Duty of Disclosure in Real Estate Transactions: It's Not Just for Sellers Anymore*, FLA. B.J., Feb. 1994, 28, 28. Morgan's article discusses the evolution, in the wake of *Johnson*, of the duty to disclose in Florida, and notes that the duty has been extended to real estate brokers, closing agents, contractors and developers. *Id.*

98. 578 So. 2d 363 (Fla. 3d DCA 1991).

99. *Id.* at 364-65 ("Johnson simply does not impose a duty of disclosure in a commercial setting."); accord *Green Acres, Inc. v. First Union Nat'l Bank*, 637 So. 2d 363 (Fla. 4th DCA 1994) (stating that there is no duty to disclose the presence of a Seminole Indian graveyard on property when such disclosure clearly would have impeded buyer's development plans); *Mostoufi v. Presto Food Stores*, 618 So. 2d 1372 (Fla. 2d DCA 1993) (finding no duty to disclose the existence of abandoned underground storage tanks); *Haskell Co. v. Lane Co.*, 612 So. 2d 669 (Fla. 1st DCA 1993); *Slitor v. Elias*, 544 So. 2d 255 (Fla. 2d DCA 1989).

100. *Futura*, 578 So. 2d at 364. However, *Lingsch v. Savage*, 29 Cal. Rptr. 201 (Ct. App. 1963), cited by the *Johnson* court in support of its holding, see *supra* note 107, involved the sale of an apartment building. Thus, while the property in *Lingsch* was not commercial property in the sense of industrial or manufacturing property, it was also not exactly residential property as viewed by the *Futura* court. *Id.*

101. *Futura*, 578 So. 2d at 364. In noting that the *Johnson* court held that the duty to disclose is "equally applicable to all forms of real property, new and used," *Johnson*, 480 So. 2d at 629, the *Futura* court wrote that "the statement when read in context, as it must be, clearly applies solely to the sale of homes." *Id.* See, e.g., *Cohens v. Virginia*, 19 U.S.(1 Wheat.) 264, 399 (1821) and *infra* note 199.

102. *Johnson*, 480 So. 2d at 626.

fraudulent statements with respect to the condition of a roof: "The record reflects that the statement made by the [seller] was a false representation of material fact, made with knowledge of its falsity, upon which the [buyer] relied to their detriment" ¹⁰³ Thus, the record fully supported an affirmance of the trial court's judgment that the seller committed fraud, and no further discussion on the part of the supreme court was necessary. ¹⁰⁴

The Florida Supreme Court, however, went on to discuss the distinction between misfeasance and nonfeasance, or action and inaction. The court noted that the common law had traditionally provided a remedy in tort only for affirmative conduct and that nonfeasance was not actionable. Further, Justice Adkins, writing for the majority, found that while

[i]n theory, the difference between misfeasance and nonfeasance, action and inaction is quite simple and obvious; . . . in practice it is not always easy to draw the line and determine whether conduct is active or passive. That is, where failure to disclose a material fact is calculated to induce a false belief, the distinction between concealment and affirmative representations is tenuous. Both proceed from the same motives and are attended with the same consequences; both are violative of the principles of fair dealing and good faith; both are calculated to produce the same result; and, in fact, both essentially have the same effect. ¹⁰⁵

Thus, the court recognized the inequities of a legal system that, on one hand, provided relief to a purchaser induced by misfeasance into completing a transaction, while on the other hand, left a purchaser induced by nonfeasance without a remedy. Reasoning that misfeasance and nonfeasance should not be distinguished as such, the supreme court wrote that a seller has a duty to disclose to a buyer material facts affecting the value of property. ¹⁰⁶

The *Futura* court failed to recognize that the *Johnson* decision was based partly ¹⁰⁷ on the absence of a bright line distinction between misfeasance and nonfeasance. The *Johnson* court said that it was irrational to base recovery on whether a purchaser could produce

103. *Id.* at 627.

104. See *supra* note 91 and accompanying text.

105. *Johnson*, 480 So. 2d at 628.

106. *Id.* at 629.

107. *Johnson*, 480 So. 2d at 628. In addition to recognizing the impractical distinction between misfeasance and nonfeasance, the court noted that "[m]odern concepts of justice and fair dealing" were inconsistent with the traditional rule of no duty to disclose. *Id.* The supreme court cited, as persuasive authority, cases in California and Illinois in which the courts had retreated from the early common law strict application of caveat emptor. See *Lingsch v. Savage*, 29 Cal. Rptr. 201 (Ct. App. 1963); *Posner v. Davis*, 395 N.E.2d 133 (Ill. App. Ct. 1979).

evidence showing affirmative fraudulent conduct when silence could be just as damaging.¹⁰⁸ Are these principles and observations absent in a commercial transaction? Does a bright line between nonfeasance and misfeasance, or inaction and action, radiate more brightly in the commercial realm? Is "the distinction between concealment and affirmative representations [less] tenuous" in commercial sales?¹⁰⁹ The *Futura* court failed to expressly recognize that the *Johnson* decision was based in part on abandoning a distinction that had become impractical to maintain.

In sum, one can read the rationale of the *Johnson* decision more expansively to extend to commercial transactions. Moreover, the *Futura* court could have carved out an exception to *Johnson* and extended the duty to disclose to suits involving commercial transactions with pollution problems.¹¹⁰ In *Slitor v. Elias*,¹¹¹ the court recognized that

Johnson does not convert a seller of a house into a guarantor of the condition of the house. . . . [T]o prove a cause of action under *Johnson*, a buyer of a house must prove the seller's knowledge of a defect which materially affected the value of the house. While knowledge in this regard can be proven by circumstantial evidence, it must nevertheless be proven by competent, sufficient evidence¹¹²

Thus, to state a valid cause of action, an aggrieved buyer must allege that the seller knew of the condition materially affecting the value of the property. Given that federal and state environmental laws often require a landowner to notify appropriate governmental agencies of the occurrence of a discharge,¹¹³ it is incongruous to permit a seller to hide behind caveat emptor and not require a disclosure to a buyer.¹¹⁴

108. *Johnson*, 480 So. 2d at 628.

109. *Id.*

110. See Elliott H. Levitas & John Vance Hughes, *Hazardous Waste Issues in Real Estate Transactions*, 38 MERCER L. REV. 581, 583 (1987). The authors argue that a requirement of disclosure of contamination is in the public's best interest, given the potential adverse health effects of exposure to hazardous waste. *Id.* at 641.

111. 544 So. 2d 255 (Fla. 2d DCA 1989).

112. *Id.* at 258-59 (citation omitted).

113. See, e.g., 33 U.S.C. § 1321(b)(5) (1988 & Supp. V 1993) (Clean Water Act); 42 U.S.C. § 9603(a) (1988 & Supp. V 1993) (CERCLA); Fla. Admin. Code Ann. r. 17-61.050(1)(b)(5) (1995).

114. See, e.g., *Sunnen Prods. Co. v. Chemtech Indus., Inc.*, 658 F. Supp. 276, 278 n.3 (E.D. Mo. 1987) (holding that a seller who was owner at the time of discharge in violation of CERCLA is liable to a buyer: "[n]o court has accepted the defense of *caveat emptor*, which would improperly shift liability for environmental contamination from the responsible party to an unwitting purchaser . . ."). The court rejected the caveat emptor defense as a matter of law.; *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989) (holding that CERCLA is not a defense to liability for contribution between buyer and seller); *State Dep't of Env'tl. Protection v. Ventron Corp.*, 440 A.2d 455 (N.J. Super.

The proposition, however, that a seller of commercial property has no duty to disclose material facts affecting the property's value continues to be good law in at least the first, second, third and fourth judicial districts of Florida.¹¹⁵ Thus, notwithstanding the unsatisfactory reasoning of the *Futura* holding, a seller of contaminated property is unlikely—in the absence of affirmative concealment, breach of express agreement or fraudulent misrepresentation—to be liable under a tort theory of fraud.

III. RESTITUTION

A. General Principles

To understand restitution¹¹⁶ and its place in the American legal system, it is useful to consider the common law as a source of potential obligations that may arise as individuals conduct their daily activities.¹¹⁷ One can view our system of law as a vehicle for protecting expectations that arise out of the commission of a tort or the breach of a contract. This notion can be illustrated by examining a few simple examples. If A wrongfully cuts down and removes B's trees, B has an expectation, protected by our system of law, that A will compensate B by an amount equal to the damages B sustained;¹¹⁸ A's wrongful act gives rise to an obligation, protected and enforceable by law, to compensate B. Similarly, if A and B execute a contract, a subsequent breach by B gives rise to A's expectation that B

Ct. App. Div. 1981), *aff'd*, 468 A.2d 150 (N.J. 1983) (holding that caveat emptor does not apply to latent defects which the seller has knowledge of and fails to disclose). *But see* Mardan Corp. v. C.G.C. Music, Ltd., 600 F. Supp. 1049, 1055 (D. Ariz. 1984), *aff'd*, 804 F.2d 1454 (9th Cir. 1986) (holding that even though the seller was liable to the government under CERCLA, the buyer could not recover costs of closing an on-site waste disposal pond from the seller because the sales agreement released the seller from liability and because the buyer was a disposer and subject to the equitable unclean hands doctrine).

115. *See* Haskell Co. v. Lane Co., 612 So. 2d 669 (Fla. 1st DCA 1993); Mostoufi v. Presto Food Stores, 618 So. 2d 1372 (Fla. 2d DCA 1993); *Futura*, 578 So. 2d at 364; Green Acres, Inc. v. First Union Nat'l Bank, 637 So. 2d 363 (Fla. 4th DCA 1994).

116. For a thorough treatment of restitution see GEORGE E. PALMER, *THE LAW OF RESTITUTION* (1978). Restitution is far too complex to permit an in-depth treatment of the subject in this article. Accordingly, this portion of the article surveys only the basic contours of restitution and narrows the focus to those specific restitutionary principles that may provide relief to a buyer of contaminated commercial property. *See also* Corbin, *supra* note 1; Saul Levmore, *Explaining Restitution*, 71 VA. L. REV. 65 (1985); Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277 (1989).

117. *See* Corbin, *supra* note 1; and Levmore, *supra* note 116, at 68 (arguing that the law acts as a bargain substitute; if parties had had time before the commission of a tort or a contract breach, they would have bargained for the prospective wrongful conduct).

118. B may also have an alternative measure of recovery under a theory of restitution. *See infra* notes 141-145 and accompanying text.

will either perform according to the terms of the contract or compensate A by an amount equal to the damages A sustained.¹¹⁹

Tort law¹²⁰ developed as a mechanism for providing a remedy to those who had suffered a loss of a legally recognized interest.¹²¹ Contract law arose to protect expectations arising out of bargains between parties;¹²² if one side commits a breach, the law provides a remedy to the aggrieved party. There is a notion, though not always present, in both contract and tort laws that a party becomes obligated to another upon the commission of a wrongful act. There are instances, however, where despite the absence of a wrongful act, a person derives a profit or benefit at the expense of another and, consequently, the "ties of natural justice and equity"¹²³ give rise to an obligation to disgorge the benefit. This obligation is neither

119. Several remedies may actually be available to A. See FARNSWORTH, *supra* note 90, § 12. For the purposes of this discussion, however, it is best to view the discharge by B of any one of the remedies as an obligation to A that is protected by law.

120. PROSSER, *supra* note 31. The difficulty in defining a tort is akin to the frustration experienced by Justice Stewart when he declined to attempt a definition of obscenity but proclaimed he would know it if he saw it. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964). PROSSER, *supra* note 31, § 1, reviews the various definitions that have been proffered over the years and finally concludes that "[l]iability in tort is based upon the relations of persons with others; and those relations may arise generally, with large groups or classes of persons, or singly, with an individual."

121. Cecil A. Wright, *Introduction to the Law of Torts*, 8 CAMBRIDGE L.J. 238, 238 (1944). Wright explains:

Arising out of the various and ever-increasing clashes of the activities of persons living in a common society, carrying on business in competition with fellow members of that society, owning property which may in any of a thousand ways affect the persons or property of others—in short, doing all the things that constitute modern living—there must of necessity be losses or injuries of many kinds sustained as a result of the activities of others. The purpose of the law of torts is to adjust these losses, and to afford compensation for injuries sustained by one person as the result of the conduct of another.

Id.

122. "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

123. *Moses v. Macferlan*, 97 Eng. Rep. 676, 681 (K.B. 1760). See also *Craig W. Sharp, P.A. v. Adalia Bayfront Condo.*, 547 So. 2d 674 (Fla. 2d DCA 1989); *Variety Children's Hospital, Inc. v. Vigliotti*, 385 So. 2d 1052, 1053 (Fla. 3d DCA 1980) ("Quasi-contracts are obligations imposed by law on grounds of justice and equity. They are imposed for the purpose of preventing unjust enrichment."). It is important to note that equity in this context does not expressly refer to the law of equity. It means a court should balance the parties' respective interests to determine whether the defendant is required to disgorge the benefit. See PALMER, *supra* note 116, § 1.2. Professor Dobbs writes: this standard of equity is "not a jurisdictional statement but a standard about the goal or a standard for judging what counts as unjust enrichment." DAN B. DOBBS, *LAW OF REMEDIES*, § 4.1(2), at 372 n.1 (2d ed. 1993) (citing *Philpot v. Superior Court*, 36 P.2d 635 (Cal. 1934)).

contractual nor delictual¹²⁴ but is said to rest in quasi-contract or restitution.¹²⁵

Restitution refers to those obligations created by law¹²⁶ that share in common the notion that one who has become "unjustly enriched" must disgorge the benefit to the aggrieved party.¹²⁷ The difficulty many practitioners have in understanding restitution and the significance of its place in American jurisprudence¹²⁸ is that, unlike its neighbors tort and contract, restitution consists of both remedial and substantive principles of law. Restitution can be separated into three general categories: (1) substantive restitution,¹²⁹ (2) remedial restitution,¹³⁰ and (3) specific restitution.¹³¹

Substantive restitution fills that interstice between tort and contract where there is neither identifiable wrongful conduct causing a loss to another's legally recognized interest nor the breach of an enforceable agreement. The roots of substantive restitution are found in Roman law.¹³² The introduction and evolution of restitution into English common law, and consequently into American

124. See Corbin, *supra* note 1.

125. *Id.* at 532. The standard for liability in restitution is not necessarily fault. See Circle Fin. Co. v. Peacock, 399 So. 2d 81, 84 (Fla. 1st DCA 1981) (explaining that a restitution action is not dependent upon the existence of wrongdoing). In a restitution action the plaintiff bears the burden of proving that the defendant is holding onto a benefit that in justice the defendant should not retain; the wrongful taking of the benefit is not what is important, it is the wrongful holding. *Id.*

126. See *supra* notes 117-119 and accompanying text.

127. RESTATEMENT OF RESTITUTION § 1 (1937). That section provides: "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." *Id.* See Policastro v. Myers, 420 So. 2d 324 (Fla. 4th DCA 1982) (implying a promise to pay a debt where it was unjust for the defendant to retain the benefit of a loan made to the defendant's former spouse); Circle Finance, 399 So. 2d at 84. Note, however, that a plaintiff seeking restitution does not have to show that he or she suffered an expense at the hands of the defendant; the plaintiff's burden is but to show that the defendant has profited in some manner, that the plaintiff is entitled to the profit, and that it would be unjust for the defendant to retain the profits. See, e.g., Olwell v. Nye & Nissen Co., 173 P.2d 652 (Wash. 1946) (holding that a plaintiff is entitled to profits generated by the use of the property even though plaintiff had no intention of using, selling, leasing or otherwise profiting from the property).

128. Laycock, *supra* note 116, at 1277. Professor Laycock points out that

[d]espite its importance, restitution is a relatively neglected and underdeveloped part of the law. In the mental map of most lawyers, restitution consists largely of blank spaces with undefined borders and only scattered patches of familiar ground. Few law schools teach a separate course in restitution, no restitution casebook is in print, and scholarship in the field is largely devoted to specific applications.

Id.

129. See *infra* notes 132-137 and accompanying text.

130. See *infra* notes 138-145 and accompanying text.

131. See *infra* notes 146-151 and accompanying text; see also Corbin, *supra* note 1; Laycock, *supra* note 116.

132. See Corbin, *supra* note 1, at 533; see also FARNSWORTH, *supra* note 90, § 1.6.

common law, began in 1602 in *Slades Case*.¹³³ Then referred to as an action of general assumpsit,¹³⁴ an English court permitted, for the first time, a creditor to recover a debt by pursuing a claim in assumpsit, thus avoiding the strictures of the action of debt which required an allegation of an express promise to pay. Essentially, the court implied a promise to pay from the factual circumstances surrounding the creation of the debt.¹³⁵ Subsequently, in *Bonnel v. Foulke*,¹³⁶ the court extended the promise implied-in-fact found in *Slades Case* and found a promise to pay where money had been mistakenly given to another. Although the factual circumstances did not support the finding of a contract, the court constructed a fictional contract to force the unjustly enriched defendant to disgorge the mistaken payment. *Bonnel* gave rise to substantive restitution, or what was then called quasi-contract. The case also illustrates a movement in English law at that time to liberalize the system of writs and provide a cause of action to a person who otherwise would not have had access to the courts.¹³⁷

Remedial restitution provides a person who has lost a legally recognized interest, either in tort or contract, a choice of valuation methods for determining the amount of the remedy. Remedies in tort generally consist of compensating the plaintiff for an injury.¹³⁸ For breach of contract, a plaintiff's remedies may include compensation of an amount equal to the expected benefit had the contract been fully performed,¹³⁹ or for any damages incurred in reliance on the contract.¹⁴⁰ A plaintiff also may measure damages in tort or contract using restitution principles to arrive at an amount equal to the benefit conferred upon the defendant, and thus prevent a windfall to the defendant.¹⁴¹

Often accompanied by the phrase "waive the tort and sue in assumpsit,"¹⁴² remedial restitutionary principles recognize that a defendant's wrongful conduct may bring a benefit greater than that

133. 76 Eng. Rep. 1074 (1602).

134. See PALMER, *supra* note 116, § 1.2.

135. *Id.* Cf. *Policastro v. Myers*, 420 So. 2d 324 (Fla. 4th DCA 1982).

136. 82 Eng. Rep. 1224 (1657).

137. Quasi-contracts or contracts implied-at-law do not depend on the mutual assent of the parties, and, indeed, a quasi-contract may be contrary to the intent of one or both parties. See *Circle Fin. Co. v. Peacock*, 399 So. 2d 84 (Fla. 1st DCA 1981); *Osborn v. Boeing Airplane Co.*, 309 F.2d 99 (9th Cir. 1962).

138. See *supra* notes 120-121.

139. See FARNSWORTH, *supra* note 90, at § 12.8.

140. *Id.* at § 12.16.

141. See FARNSWORTH, *supra* note 90, § 12.20; DOBBS, *supra* note 123, § 4.1(4); see also Corbin, *supra* note 1, at 538; Laycock, *supra* note 116, at 1285.

142. See Corbin, *supra* note 1, at 538; PROSSER, *supra* note 31, § 94.

of the loss sustained by the plaintiff.¹⁴³ Remedial restitution permits the plaintiff to recover the value of the defendant's enrichment because it would be unjust to permit the defendant to retain the benefit. This remedy provides a disincentive for wrongdoing and presumably encourages the defendant not to bargain for wrongful conduct.¹⁴⁴ To recover under a remedial restitution theory, the plaintiff must prove the existence of an underlying tort or breach of contract.¹⁴⁵

Specific restitution, the last of the three branches of restitution, concerns the return, in kind, of the benefit unjustly held by the defendant.¹⁴⁶ In contrast to substantive and remedial restitution, specific restitution includes both equitable as well as legal actions. Equitable actions include constructive trust¹⁴⁷, rescission¹⁴⁸ and subrogation.¹⁴⁹ Ejectment and replevin are specific restitution actions at law.¹⁵⁰

In sum, restitution stands on its own as a substantive area of law apart from the principles of contract and tort law. Restitution also involves remedial concepts. Substantive restitution may provide relief to a commercial property owner who has cleaned up pollutants discharged by a predecessor-in-title. Specific restitution may permit a buyer to rescind the sales contract and return the contaminated property to the seller in exchange for a return of the purchase price to the buyer. Remedial restitution is of no help here because, as explained above, a buyer must establish an underlying tort action.¹⁵¹

143. See Laycock, *supra* note 116, at 1286.

144. This disincentive premise conflicts with the neoclassic school of law and economics which favors the traditional notions of compensation for the purpose of returning the plaintiff to the rightful position. Followers of this school argue that societies' resources are best utilized when its members are able to pay for their wrongful conduct without regard to profit gained. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 1.2 (3d ed. 1986). A discussion of these competing schools is beyond the scope of this paper. For thorough treatments see POSNER, *id.*; Laycock, *supra* note 116, at 1289; Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1124-27 (1972).

145. See Corbin, *supra* note 1, at 538; PROSSER, *supra* note 31, § 94, at 673; Laycock, *supra* note 116, at 1286. The plaintiff may choose the restitutionary measure of his or her damages and sue in quasi-contract even where the amount is equal to the plaintiff's loss, because the applicable contract statute of limitations is more favorable and a contract claim may afford a greater variety of recoverable damages. *Id.* Restitution also is useful where the defendant is insolvent. An action in restitution can often give one a preference over other creditors because it goes after the property retained by the defendant and declares title to be in the plaintiff and not the defendant. *Id.*

146. See Laycock, *supra* note 116, at 1290.

147. See DOBBS, *supra* note 123, § 4.3(2).

148. *Id.* at § 4.3(6); see *infra* notes 152-156 and accompanying text.

149. *Id.* at § 4.3(4).

150. *Id.* at § 4.2(2).

151. See *supra* notes 26-115 and accompanying text.

B. Mistake and Rescission

An action in rescission may be available to a buyer of contaminated land where the buyer can show that at the time of the execution of the sales contract both the seller and buyer labored under a mutual mistake as to the physical condition of the land.¹⁵² The buyer seeking rescission bears the burden of showing both that he and the seller believed that the property did not contain hazardous wastes. Rescission would result in re-conveyance of the property to the seller and restitution of the purchase price to the buyer.¹⁵³

When the mistake is discovered long after the conveyance, however, rescission may be impracticable and cost-prohibitive because the success of the buyer's enterprise may depend on the property, notwithstanding the presence of the contamination.¹⁵⁴ Moreover, rescission fails to promote the cleanup of hazardous wastes because it simply shifts title in the contaminated property from one party to another.¹⁵⁵ Rescission may only be practicable when the buyer learns of the contamination soon after the conveyance and the buyer has neither invested, apart from the purchase price, a substantial amount of resources in the property nor depended upon the property for the continued success of a business.¹⁵⁶

152. See Kenneth J. Rampino, Annotation, *Vendor and Purchaser: Mutual Mistake as to the Physical Condition of Realty as Ground for Rescission*, 50 A.L.R. 1188 (3d ed. 1975); FARNSWORTH, *supra* note 90, § 9.3; see also *Rood Co. v. Board of Pub. Instruction*, 102 So. 2d 139 (Fla. 1958); *Moore v. Wesley E. Garrison, Inc.*, 5 So. 2d 259, 262 (Fla. 1942) ("Where there is a material mistake by one or both parties to a deed as to identity, situation, boundaries, title, and amount or value of land conveyed, equity will grant relief."); *Rosique v. Windley Cove, Ltd.*, 542 So. 2d 1014 (Fla. 3d DCA 1989); *Nussey v. Caufield*, 146 So. 2d 779 (Fla. 2d DCA 1962).

153. The buyer would have to pay the seller reasonable rent for the time the buyer occupied the property prior to rescission. The seller would have to pay the buyer for any improvements of the property.

154. The successful marketing of the buyer's products may depend on the contaminated property's geographic location, while other locations may increase transportation costs.

155. "Rescission . . . fails to advance the goal of cleaning up the land, for it merely voids the transfer, dumping the tainted parcel back into the lap of the seller." R. Lisle Baker & Michael J. Markoff, *By-Products Liability: Using Common Law Private Actions to Clean Up Hazardous Waste Sites*, 10 HARV. ENVTL. L. REV. 99, 123 (1986).

156. To the extent the sales price does not take into account the presence of pollutants, a seller of contaminated property is unjustly enriched, as it receives more than the market value of the property. An action in unjust enrichment, however, is unavailable to recover this benefit from the seller. An action to recover this benefit would amount to a reformation of the sales contract. Reformation, however, is limited to mistakes in expression or integration—the parties have mistakenly executed a contract that does not accurately reflect their agreement. See PALMER, *supra* note 116, § 13. Where the parties are mistaken as to the physical condition of property, the mistake is in the underlying assumptions on which the transaction is based. See PALMER, *supra* note 116, §§ 11.2, 12. Reformation is permitted where there is mistake in expression because the courts do not involve themselves in the underlying transaction to which the parties have agreed; the court simply reforms the contract to accurately reflect the parties' agreement. Where there is a mistake in assumptions, in contrast, an underlying agreement

C. *Substantive Restitution as a Basis for Recovering Pollution Cleanup Costs*

There are no reported Florida cases addressing the question of whether substantive restitution, in favor of a private litigant, is appropriately applied in the context of environmental cleanups. However, outside Florida, a body of law exists supporting the notion that a discharge of another's statutory duty to clean up an unlawful release of pollutants may give rise to quasi-contractual obligations.¹⁵⁷ In addition, some Florida restitution cases can be synthesized to support an unjust enrichment claim in favor of a buyer of contaminated land who has incurred expenses for cleaning up pollutants discharged by the seller.¹⁵⁸ This section examines more closely the issue of substantive restitution and the cases both within and outside Florida that might lend support to such a cause of action.

As discussed above, substantive restitution can provide relief to a plaintiff who has conferred a benefit upon a defendant where, under the circumstances, it would be unjust for the defendant to retain the benefit.¹⁵⁹ The cases addressing this point are generally found in two contexts: (1) situations where the plaintiff has conferred a benefit to the defendant upon the defendant's request;¹⁶⁰ and (2) situations where the benefit is conferred without the defendant's request.¹⁶¹ The latter situation is pertinent here—a buyer remediates, without

does not exist to reform. Thus, the court intervenes only to return the parties to their pre-transaction positions by ordering rescission of the sales contract.

157. See *infra* note 171.

158. See *infra* notes 175-180 and accompanying text.

159. See *supra* notes 132-137 and accompanying text.

160. See PALMER, *supra* note 116, § 6.10; DOBBS, *supra* note 123, § 4.2(3).

161. Section 112 of the *Restatement of Restitution* (1937), provides the general rule with respect to restitution for benefits conferred without request:

A person who without mistake, coercion or request has unconditionally conferred a benefit upon another is not entitled to restitution, except where the benefit was conferred under circumstances making such action necessary for the protection of the interests of the other or of third persons.

See, e.g., *Tipper v. Great Lakes Chem. Co.*, 281 So. 2d 10 (Fla. 1973).

Professor John W. Wade provides a thorough survey of this restitutionary principle in his article *Restitution for Benefits Conferred Without Request*, 19 VAND. L. REV. 1183 (1966), and concludes that the negative phraseology of section 112 might be better understood from a positive perspective:

One who, without intent to act gratuitously, confers a measurable benefit upon another, is entitled to restitution, if he affords the other an opportunity to decline the benefit or else has a reasonable excuse for failing to do so. If the other refuses to receive the benefit, he is not required to make restitution unless the actor justifiably performs for the other a duty imposed upon him by law.

Id. at 1212. Professor Wade correctly points out that the sub-elements of his statement of general principle are subject to judicial construction and discretion, but further notes that the statement sufficiently explains the outcome of recorded opinions and should provide a practicable framework from which future cases might be decided. *Id.*

the seller's request, the contaminated property and thereby confers a benefit upon the seller. Whether a buyer can recoup cleanup costs under a theory of restitution will turn on the buyer's ability to establish two elements: (1) the seller benefitted when the buyer cleaned up the pollutants; and (2) the seller would be unjustly enriched if permitted to retain the benefit without reimbursing the buyer for his or her efforts.¹⁶²

Among the various ways one can confer a benefit upon another is by discharging the latter's statutory or legal obligations.¹⁶³ Specifically, a benefit may be conferred when the plaintiff "perform[s] the defendant's obligation to specifically rectify the consequences of [the defendant's actions]."¹⁶⁴ The defendant's obligation may spring from several sources. It may derive from common law, such as an obligation to compensate another for the commission of a tort or the breach of a contract.¹⁶⁵ State or federal statutes may also impose a duty upon the defendant.¹⁶⁶ Further, at least one court has found a duty to perform where the defendant's obligation was based neither on common law nor on a statute, concluding that "[d]uty is a flexible concept, . . . [and] its existence depends on calibrating legal obligations to factual contexts."¹⁶⁷

162. The primary purpose of restitution is to restore the plaintiff to the position in which he or she was before the defendant received the benefit which gave rise to the obligation to restore; hence the plaintiff is entitled to recover that which he or she parted with, or that which the defendant has received. *Sun Coast Int'l, Inc. v. Department of Business Reg., Div. of Fla. Land Sales, Condominiums and Mobile Homes*, 596 So. 2d 1118, 1120-21 (Fla. 1st DCA 1992).

163. For an early application of this principle, see *Metropolitan R.R. v. District of Columbia*, 132 U.S. 1 (1889). The *Metropolitan* court found, for purposes of determining which statute of limitation to apply, that a claim by the District of Columbia to recover the cost of discharging a statutory obligation of a railway company, created and chartered by an Act of Congress, sounded in restitution. *Id.* A plaintiff may also enrich another by: "(1) transferring property to the defendant, (2) saving, preserving or improving his property, (3) rendering personal services for him, or (4) performing for him a duty imposed . . . by his own contractual arrangements." See Wade, *supra* note 161, at 1183. See also *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967).

164. PALMER, *supra* note 116, § 10.6(b).

165. See *supra* notes 115-117 and accompanying text. See, e.g., *Nassr v. Commonwealth*, 477 N.E.2d 987, 993 (Mass. 1985) ("It is a well-established rule that 'it is the duty of the [property] owner to guard against the danger to which the public is thus exposed, and he is liable for the consequences of having neglected to do so, whether the unsafe condition was caused by himself or another.'" (alteration in original) (citation omitted)).

166. See *Variety Children's Hosp., Inc. v. Vigliotti*, 385 So. 2d 1052 (Fla. 3d DCA 1980).

167. *United States v. Consolidated Edison Co.*, 580 F.2d 1122, 1127 (2d Cir. 1978) ("Section 115 of the Restatement [of Restitution] certainly does not require either by its terms or under the case law interpreting it, that a duty must be absolute to fall within its parameters."); see *infra* note 170; see also *Hebron Pub. Sch. Dist. v. U.S. Gypsum*, 690 F. Supp. 866 (D.N.D. 1988) (citing to *Consolidated Edison* in support of its ruling); *Sommers v. Putnam County Bd. of Educ.*, 148 N.E. 682 (Ohio 1922); cf. *Halliday v. Marchington*, 184 N.E. 698 (Ohio Ct. App. 1932).

*Wyandotte Transportation Company v. United States*¹⁶⁸ illustrates that enrichment can arise from the performance of another's statutory duty. In *Wyandotte*, the supreme court held that the United States was entitled to recover the expense of performing the defendant's statutory duty to remove a barge that had sunk and was endangering shipping traffic on the Mississippi River.¹⁶⁹ Here, the government conferred a benefit upon the defendant by performing the company's statutory duty to remove the barge. The court found that retention of the benefit by the company would be unjust and thus held that the defendant could be found liable under a theory of quasi-contract.¹⁷⁰

Recent environmental law cases hold that statutes providing reimbursement to government entities for the cost of cleaning up pollutants are based upon restitutionary principles.¹⁷¹ In those actions, the government established that the defendants discharged pollutants and were responsible, pursuant to statute, for cleaning up the contaminants.¹⁷² When the polluters did not undertake cleanup of the pollutants, the government stepped in and remedied the situation. The court in *United States v. P/B STCO 213* found that the polluters were enriched because "by failing to perform their statutory duty to clean up the [pollutants], thereby causing the government to fulfill their duty, the defendants avoided the cost of doing what they were primarily obligated to do."¹⁷³ While these decisions found that the government's statutory recovery was based on restitutionary principles in the context of determining the applicable statute of limitations, the underlying restitutionary principles are

168. 389 U.S. 191 (1967).

169. *Id.* at 204. See also *Consolidated Edison*, 580 F.2d at 1131.

170. The court does not specifically refer to its holding in terms of restitution, but cites section 115 of the *Restatement of Restitution*, which provides:

A person who has performed the duty of another by supplying things or services, although acting without the other's knowledge or consent, is entitled to restitution from the other if

(a) he acted unofficially and with intent to charge therefor, and

(b) the things or services supplied were immediately necessary to satisfy the requirements of public decency, health, or safety.

In *Wyandotte*, the removal of the barge impacted public safety in two ways: it eliminated both a waterway hazard and the risk of an environmental accident. See *Jacksonville v. Sohn*, 616 So. 2d 1173 (Fla. 1st DCA 1993)(refusing to adopt § 115 because of the insufficiency of the appellant's allegations).

171. See *United States v. Monsanto Co.*, 858 F.2d 160, 176 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989) (holding that reimbursement of CERCLA costs is restitutionary); *United States v. Wade*, 713 F.2d 49 (3d Cir. 1983); *United States v. P/B STCO 213*, 756 F.2d 364 (5th Cir. 1985) (finding that reimbursement of cleanup costs under the Clean Water Act is restitutionary); *United States v. Barge Shamrock*, 635 F.2d 1108 (4th Cir. 1980), *cert. denied*, 454 U.S. 830 (1981).

172. See 42 U.S.C. § 9607(a)(1988 & Supp. V 1993); 33 U.S.C. § 1321 (1988 & Supp. V 1993).

173. *P/B STCO 213*, 756 F.2d at 375.

sound. Accordingly, these cases illustrate that performance of another's statutory duty confers a benefit that a court may require one to disgorge. These principles should be equally applicable to both public and private plaintiffs.¹⁷⁴

There is little case law in Florida relating to the performance of another's duty or legal obligation giving rise to a claim for unjust enrichment.¹⁷⁵ In *Variety Children's Hospital, Inc. v. Vigliotti*,¹⁷⁶ the court held that a mother has a statutory duty to provide "necessaries" for her child and thus, performance of that duty by another may give rise to an action based on unjust enrichment.¹⁷⁷ Similarly, the discharge of pollutants in Florida may give rise to a statutory duty on the part of the polluter to clean up the contaminants.¹⁷⁸

Section 376.305(1), Florida Statutes (1993), provides that "[a]ny person discharging a pollutant as prohibited by sections 376.30-376.319 shall immediately undertake to contain, remove, and abate the discharge to the satisfaction of the [Florida Department of

174. See *One Wheeler Rd. Assocs. v. Foxboro Co.*, 843 F. Supp. 792 (D. Mass. 1994) (holding action in quasi-contract by current property owner against predecessor-in-title for cost of cleanup of pollutants valid but unnecessary because state environmental statutes provided reimbursement); *Presby v. Bethlehem Village Dist.*, 416 A.2d 1382 (N.H. 1980) (contractor performing duty of government entity to provide sewer entitled, under quasi-contract theory, to recover cost of installation from government entity); *Baker & Markoff*, *supra* note 155, at 116 (concluding that "to the extent that a cleanup by a current owner discharges the unliquidated liabilities of [polluters] under CERCLA or other statutes, the [polluter] is enriched.").

175. Many of the cases that exist providing for recovery based upon performance of another's legal obligations are subrogation actions. Subrogation actions are restitutionary and ultimately based on unjust enrichment; therefore, many of the principles found in subrogation actions should be applicable to unjust enrichment actions based upon benefits conferred without request. See, e.g. *West Am. Ins. Co. v. Yellow Cab Co.*, 495 So. 2d 204, 206 (Fla. 5th DCA 1986) ("Subrogation provides an equitable remedy for restitution to one who in the performance of some duty has discharged a legal obligation which should have been met, either wholly or partially, by another." (citations omitted)).

176. 385 So. 2d 1052 (Fla. 3d DCA 1980).

177. *Id.* at 1054 ("[T]he mother received a 'legal' benefit when the hospital rendered its services to her child. Her duty to provide or procure necessary medical services for her daughter was fulfilled. She would be unjustly enriched if allowed to enjoy that benefit without compensating the hospital."). The court cited to section 744.301, Florida Statutes (1977), as being the source of the mother's duty. *Id.*

178. It is unclear whether these statutes apply retroactively. In *Sunshine Jr. Food Stores, Inc. v. State Dep't of Envtl. Regulation*, 556 So. 2d 1177 (Fla. 1st DCA 1990), the defendant was cited with a violation of section 376.302, Florida Statutes, which was originally enacted in 1984, for a discharge that allegedly took place sometime between 1979 and 1984. The *Sunshine Jr. Food Stores* holding suggests that at least Chapter 376, Florida Statutes, applies retroactively. *Id.* But see *Cunningham v. Anchor Hocking Corp.*, 558 So. 2d 93, 99 (Fla. 1st DCA 1990) (applying Chapter 376: "[complainant] must . . . prove causes of action arising after the statute's effective date."); *State Dep't of Pollution Control v. Int'l Paper Co.*, 329 So. 2d 5 (Fla. 1976) (Environmental statute does not apply retroactively, construing section § 403.121, Florida Statutes). Consequently, the timing of the discharge may determine whether the defendant had a duty to address the discharge and whether the plaintiff's clean up of the discharge confers a benefit upon the defendant.

Environmental Protection]. . . ."¹⁷⁹ When a Florida landowner discharges a pollutant, the landowner becomes saddled with a legal obligation to clean up the contaminants and is enriched when the obligation is performed by a subsequent buyer who acquires the land without any contractual assumption of the responsibility to clean up the discharge.¹⁸⁰

A plaintiff also may enrich a defendant by preventing the accrual of a claim, in favor of a third party, against the defendant.¹⁸¹ That is, if injury to a third party is prevented by the plaintiff's conduct, the defendant is enriched.¹⁸² In insurance law, a number of cases hold that when an insured's party takes steps to protect the insured property, the insurer should reimburse the insured for the expense of preventing a loss covered by the policy.¹⁸³ While references to unjust enrichment are conspicuously absent in these opinions, and the measure of damages was not restitution,¹⁸⁴ these cases can be explained by applying restitutionary principles.¹⁸⁵

As discussed above, our system of law can be viewed as protecting a person's expectations that are the by-product of obligations springing from the commission of a tort or the breach of a contract.¹⁸⁶ In the insurance cases noted above, the insurer's obligation to pay the arises when the insured sustains a loss. A loss is a

179. FLA. STAT. § 376.305(1) (1993). "'Discharge' includes, but is not limited to, any spilling, leaking, seeping, pouring, misapplying, emitting, emptying, or dumping of any pollutant which occurs and which affects lands and the surface and ground waters of the state" FLA. STAT. § 376.301(6) (1993).

180. Although the author has found no Florida case law specifically addressing the question of whether a statutory duty to clean up a discharge survives a conveyance of the contaminated property to another, at least one case implicitly answers the question. *Sunshine Jr. Food Stores v. State Dep't of Env'tl. Regulation*, 556 So. 2d 1177 (Fla. 1st DCA 1990). In *Sunshine Jr. Food Stores*, the court adopted a hearing officer's findings that a corporation was responsible for cleaning up a discharge even though the corporation no longer owned the property and that the state's Notice of Violation was served after the corporation conveyed the property to a subsequent buyer with knowledge that the property contained underground storage tanks. *Id.*

181. See PALMER, *supra* note 116, § 10.6(b); Wade, *supra* note 161, at 1188-90.

182. *Id.*

183. See, e.g., *Slay Warehousing Co. v. Reliance Ins. Co.*, 471 F.2d 1364 (8th Cir. 1973); *Harper v. Pelican Trucking Co.*, 176 So. 2d 767 (La. Ct. App. 1965); *Leebov v. United States Fidelity & Guaranty Co.*, 165 A.2d 82 (Pa. 1960).

184. It is likely that an accurate measure of the damages that would have resulted—and thus the measure of the insurer's liability under the policy had the insured not taken preventive measures—is unavailable. Courts generally disfavor speculative damages and thus this may account for the decision to base damages on the insured's out-of-pocket expenses and not the benefit conferred to the insurer.

185. See Note, *Allocation of the Costs of Preventing an Insured Loss*, 71 COLUM. L. REV. 1309, 1316 (1971) (suggesting that *Leebov* may have been decided on a quasi-contractual theory); cf. *McNeilab, Inc. v. North River Ins. Co.*, 645 F. Supp. 525 (D.N.J. 1986), *aff'd*, 831 F.2d 287 (3d Cir. 1987).

186. *Supra* notes 117-119 and accompanying text.

condition precedent to the insurer performing under the policy or insurance contract. These cases hold that the insured is entitled to reimbursement for the cost of preventing the insurance company's duty to perform.

Similarly, a tortfeasor's (or contract breacher's) obligation to pay the injured party arises when the injured party sustains a loss.¹⁸⁷ Thus, one who intervenes to prevent the injury may be entitled to reimbursement for the cost of preventing the loss. The tortfeasor is enriched by the intervenor, and the intervenor is entitled to recovery under restitutionary principles¹⁸⁸ if the enrichment is unjust.¹⁸⁹ Assuming the defendant's enrichment is unjust, "[i]t would be an anomaly to allow third parties to sue the [defendant] for injuries resulting from the [defendant's] acts, but not allow the [intervenor] to recover for the cost of preventing the injuries from occurring."¹⁹⁰

The Florida Supreme Court has recognized that preventing the accrual of liability confers a benefit that may give rise to a quasi-contract.¹⁹¹ In *Tipper v. Great Lakes Chemical Company*, the court found a quasi-contractual employment relationship between two parties that permitted the plaintiff to claim workers' compensation benefits for injuries sustained while "working" for the defendant.¹⁹² The relationship between the parties arose when a tractor-trailer owned by the defendant, carrying cylinders of methyl bromide gas, was involved in an accident in Florida. The accident caused a rupture of the cylinders, and gas began to escape. The defendant was unable to immediately respond to the accident because the company's home office was in Arkansas.¹⁹³

A local law enforcement official sought assistance from the plaintiff "because of his expertise in the handling of deadly gases as part of his regular employment."¹⁹⁴ The plaintiff subsequently sustained injuries while assisting with the cleanup. In finding a quasi-contract of employment, the court stated that the plaintiff enriched the defendant when he "restrict[ed] the liability of the [defendant] from further damages from the accident."¹⁹⁵ Although the opinion is silent

187. PALMER, *supra* note 116, § 10.6(b).

188. Palmer writes that in this situation the "[b]enefit is certainly present, and if self-interest would support restitution to a plaintiff who satisfied the liability, it should do so as well when he forestalled the liability." PALMER, *supra* note 116, § 10.6(b).

189. See *infra* notes 202-209 and accompanying text.

190. See Baker & Markoff, *supra* note 155, at 116-17.

191. *Tipper v. Great Lakes Chem. Co.*, 281 So. 2d 10 (Fla. 1973).

192. 281 So. 2d at 10.

193. *Id.* at 11.

194. *Id.*

195. *Id.* at 15.

about whether the plaintiff, given the defendant's enrichment, could recover restitutionary damages,¹⁹⁶ the case shows that a defendant also may be enriched to the extent that the plaintiff permits the defendant to avoid harm to third parties.¹⁹⁷

When a landowner discharges pollutants, the landowner may be liable for damages in tort for injuring adjacent land and neighbors.¹⁹⁸ A landowner who sells the property after the discharge also may continue to be subject to a tort action for damages.¹⁹⁹ Thus, a buyer of contaminated land who cleans up and contains any contaminants enriches the seller to the extent potential future law suits are averted.

In sum, a plaintiff can establish enrichment of the defendant by showing that the plaintiff performed a duty that the defendant was once obligated to perform.²⁰⁰ Where a plaintiff intervenes to prevent a defendant's acts from damaging a third party, the defendant also is enriched to the extent that the defendant does not incur liability as a result of the wrongful conduct. A showing of enrichment, however, is just the first step to recovery in restitution. The plaintiff also must show that retention of the benefit by the defendant would be unjust.²⁰¹

The courts determine whether retention of a benefit would be unjust by examining the circumstances under which the plaintiff conferred the benefit.²⁰² The fact that the defendant did not request the benefit or that the plaintiff voluntarily conferred the benefit is generally given great weight.²⁰³ Consequently, courts encounter competing policies in determining whether a benefit is unjust: (1) defendants should not be permitted to retain unjust enrichments, versus (2) defendants should not be forced to disgorge benefits

196. The court found that the fictional contract permitted the plaintiff to receive compensation in the way of workers' compensation benefits. *Id.*

197. *Id.*

198. See *supra* notes 26-115 and accompanying text.

199. See Restatement (Second) of Torts § 373 (1965):

(1) A [seller] of land who has created or negligently permitted to remain on the land a structure or other artificial condition which involves an unreasonable risk of harm to others outside of the land, because of its plan, construction, location, disrepair, or otherwise, is subject to liability to such persons for physical harm caused by the condition after his [buyer] has taken possession of the land.

(2) If the [seller] has created the condition, or has actively concealed it from the [buyer], the liability stated in Subsection (1) continues until the [buyer] discovers it and has reasonable opportunity to take effective precautions against it. Otherwise the liability continues only until the [buyer] has had reasonable opportunity to discover the condition and to take such precautions.

200. See *infra* notes 223-229.

201. *Id.*

202. See *supra* notes 168-174.

203. See Wade, *supra* note 161, at 1184.

conferred by an officious intermeddler²⁰⁴ or mere volunteer.²⁰⁵ Professor Wade has suggested that courts should de-emphasize this dichotomy and consider "the volunteer-policy . . . a factor of consequence in determining whether or not the enrichment is unjust."²⁰⁶

Under this volunteer policy, to determine whether the defendant should disgorge the benefit, one should begin with the presumption that the intervenor was a mere volunteer and then examine whether the facts and circumstances rebut the presumption; that is, was there an excuse or justification for intervening in the defendant's affairs.²⁰⁷ A recent Washington state appellate court addressed the question of whether a plaintiff's intervention was justified by considering:

(1) whether the benefits were conferred at the request of the party benefitted . . .

(2) whether the party benefitted knew of the [plaintiff's performance], but stood back and let the party make the payment . . . and

(3) whether the benefits were necessary to protect the interests of the party who conferred the benefit or the party who benefitted thereby.²⁰⁸

An additional consideration is whether the benefits were immediately necessary "to satisfy the requirements of public decency, health or safety."²⁰⁹

For purposes of finding that a buyer is entitled to reimbursement of environmental cleanup costs based on restitution, the focus is likely to be on whether the buyer acted to protect his own interests or those of society.²¹⁰ In *Tipper*,²¹¹ the court acknowledged that benefits

204. "Officiousness is the term traditionally used to describe interference in the affairs of others that is not justified [under] the circumstances." FARNSWORTH, *supra* note 90, § 2.20.

205. Professor Wade writes that "[m]ost [restitutionary] statements . . . have indicated that the volunteer-policy has prevailed over the unjust-enrichment principle, but a study of the cases indicates that there is a fairly delicate, and somewhat precarious balance between them and that the line of demarcation is a difficult one to draw." Wade, *supra* note 161, at 1184-85. See also PALMER, *supra* note 116, § 10.1 ("When restitution of an unsolicited benefit is denied, the court is apt to explain the decision by saying that the plaintiff was a volunteer or that his transfer of the benefit was voluntary.").

206. Wade, *supra* note 161, at 1185. See also RESTATEMENT OF RESTITUTION §§ 1, cmt. c, 2 cmt. a (1937).

207. See PALMER, *supra* note 116, § 10.1.

208. *Ellenburg v. Larson Fruit Co.*, 835 P.2d 225, 229 (Wash. Ct. App. 1992).

209. RESTATEMENT OF RESTITUTION § 115 (1937). "The law's concern that needless services not be foisted upon the unsuspecting has led to the formulation of the 'officious intermeddler doctrine.' It holds that where a person performs labor for another without the latter's request or implied consent, however beneficial such labor may be, he cannot recover therefor." *Nursing Care Servs., Inc. v. Dobos*, 380 So. 2d 516, 518 (Fla. 4th DCA 1980) (citation omitted).

210. Professor Palmer notes the perverseness in the means by which the label of volunteer is rebutted: "Our law finds itself in the paradoxical position of aiding one who acted in his own

conferred by a volunteer are not recoverable, but that a person's volunteer status is rebuttable:

Where it is imperatively necessary for the protection of the interests of third persons or of the public that a duty owed by another should be performed, a stranger who performs it may be entitled to restitution from the other, even though his performance was without the other's knowledge or against his will.²¹²

A buyer who cleans up contaminants discharged by a predecessor-in-title protects multiple interests. The buyer protects his or her own interests by avoiding potential tort liability.²¹³ The buyer protects the interests of neighboring property owners by preventing damage to their property, and similarly safeguards the interests of society by performing the task.²¹⁴ Therefore, a buyer who cleans up contaminants discharged by the seller is not acting as a volunteer or officious meddler and, to the extent the seller is enriched, the enrichment is unjust.²¹⁵

IV. ANALYSIS & PROBLEMS

Substantive restitution may provide a remedy to an aggrieved buyer in Florida where traditional tort liability does not. The distinction in principles underpinning tort/contract and restitution may explain why. Tort and contract liability generally require the presence of a pre-existing relationship or a duty between parties coupled with a breach of that duty which causes an injury to a legally recognized interest. The focus, therefore, is on the conduct of the defendant, and the measure of compensation due the plaintiff is based upon the amount of injury or damage to the plaintiff's

interest while denying aid to one who acted from the generally more laudable motive of protecting the interest[s] of another." PALMER, *supra* note 116, § 10.1.

211. 281 So. 2d 10 (Fla. 1973).

212. *Id.* at 13.

213. See PALMER, *supra* note 116, §§ 10.2, 10.5.

214. *Id.*

215. In *Florida Power & Light Co. v. Allis Chalmers Corp.*, 752 F. Supp. 434 (S.D. Fla. 1990), a federal district court synthesized the holdings in *Tipper* and *Vigliotti*, and recognized that an action in quasi-contract may be available to a landowner who by cleaning up contaminated land discharges the statutory duty of the alleged contaminator. Although the alleged contaminator in *Florida Power* was not a predecessor-in-title to the plaintiff-landowner, the opinion suggests that a landowner who has discharged a predecessor-in-title's duty to cleanup pollutants may have available to the landowner an action in quasi-contract for reimbursement of the cost of cleanup. See *One Wheeler Rd. Assoc. v. Foxboro Co.*, 843 F. Supp. 792 (D. Mass. 1994), where the court, in ruling on a motion for summary judgment, ruled that a landowner has a cause of action in quasi-contract against a predecessor-in-title to recover costs of cleaning up a predecessor's contamination of the property.

interests.²¹⁶ Further, the availability of affirmative defenses generally turns on the relationship between the parties.²¹⁷

In contrast to liability based on tort or contract, restitution focuses on the enrichment of the defendant and whether notions of justice and equity are such that the defendant should disgorge the benefit.²¹⁸ If the circumstances are such that it would be unjust for the defendant to retain the benefit, the court creates a relationship between the parties.²¹⁹ This quasi-contractual relationship and its attendant legal obligations are not as vulnerable to attack by a defendant as those obligations to compensate a plaintiff stemming from the commission of a tort or breach of a contract. Nevertheless, restitution actions are not without their own unique problems.

A potential problem confronting a buyer proffering a restitution argument is that the law will not imply a contract were a valid one exists.²²⁰ It is unclear in Florida to what extent application of this principle would preclude a buyer's restitution action against a seller for recovery of the cost of performing the latter's statutory duty to clean up a discharge.²²¹ One argument is that an absence of specific language in the sales contract referring to pollution problems should permit a buyer's action in restitution because the writing did not deal with the subject matter of the quasi-contract—the presence of pollution. That is to say that the writing did not expressly allocate the risks and obligations with respect to pollution problems between the parties to the contract. However, there is support for the contrary argument that a plaintiff may not pursue a quasi-contract action if the plaintiff had an opportunity, in a previous contract, to provide for the allocation of risks that are the subject of a quasi-contract

216. See PROSSER, *supra* note 31, § 30.

217. Assumption of risk, caveat emptor, contributory negligence, contractual waiver, Statute of Frauds, etc., are examples of defenses to tort or contract liability. See PROSSER, *supra* note 31, §§ 65, 68; FARNSWORTH, *supra* note 90, §§ 6.1-6.12.

218. See Corbin, *supra* note 1.

219. *Id.*

220. *Hazen v. Cobb*, 117 So. 853 (Fla. 1928); *Salutec Corp. v. Young & Lawrence Assocs.*, 243 So. 2d 605, 606 (Fla. 4th DCA 1971); see *Clark-Fitzpatrick, Inc. v. Long Island R.R.*, 516 N.E.2d 190 (N.Y. 1987) ("[E]xistence of a . . . written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events rising out of the same subject matter.").

221. Most of the reported Florida opinions in which this principle is discussed are in the context of a plaintiff seeking recovery in quantum meruit where there was a pre-existing employment contract. E.g., *Hoon v. Pate Constr. Co.*, 607 So. 2d 423 (Fla. 4th DCA 1992) (construction contract); *Harding Realty, Inc. v. Turnberry Towers Corp.*, 436 So. 2d 983 (Fla. 3d DCA 1983) (involving real estate broker's fees); *In re Estate of Lonstein*, 433 So. 2d 672 (Fla. 4th DCA 1983) (establishing attorney's fees).

action but failed to do so.²²² Consequently, to the extent there was a valid and enforceable sales contract, bargained for under circumstances where the parties had an unfettered opportunity to negotiate and allocate potential risks, a seller may not be able to subsequently seek recovery in quasi-contract for cleaning up a pre-sale discharge of pollutants.

Another impediment to a buyer recovering in quasi-contract stems from the very nature of the cause of action. Before a buyer can recover in quasi-contract, the buyer already must have conferred a benefit upon the seller; the seller is enriched only to the extent the seller's statutory duty to clean up the property is performed. The costs, however, of cleaning up contaminated property can be astronomical, and often a buyer lacks sufficient resources to undertake the cleanup.²²³ Actions in tort and contract do not require that the property be cleaned up because the remedial focus in those actions is to compensate the buyer for the diminution of property value or other damages. In contrast, restitution actions look at the enrichment of the defendant. A suggested solution to the problem that cleanup must take place in advance of an action in restitution is application of "restorative restitution" principles.²²⁴

Restorative restitution permits a person to initiate an action for cleanup costs prior to restoration of the property. Scholars cite to the rationale in *Spur v. Del E. Webb Development Company*²²⁵ as providing

222. See *First Commodity Traders, Inc. v. Heinold Commodities, Inc.*, 766 F.2d 1007, 1011 (7th Cir. 1985) (stating that a plaintiff who failed to sufficiently allocate the risk in a previous bargain "may not [later] unilaterally alter the terms of the contract by . . . claiming unjust enrichment"); see also *Quadion Corp. v. Mache*, 1991 WL 111170 (N.D. Ill. 1991). In *Quadion* a corporation acquired contaminated property in connection with the acquisition of another company. The corporation cleaned up the pollutants and subsequently sought reimbursement by, among other claims, seeking relief in quasi-contract. In ruling against the corporation, the court said "[t]he fact that the contract between [buyer and seller] did not allocate the risk of PCB contamination does not allow [buyer] to now invoke a quasi-contract remedy . . . [the buyer] could have provided for the allocation of this risk under the terms of the contract." *Id.*

223. See *supra* note 2.

224. See *Baker & Markoff*, *supra* note 155, at 121; Steven Ferry, *The Toxic Time Bomb: Municipal Liability for the Cleanup of Hazardous Waste*, 57 GEO. WASH. L. REV. 197, 274 (1988) (arguing that restorative restitution principles may be applied to CERCLA liability apportionment problems).

225. 494 P.2d 700 (Ariz. 1972). *Spur* involved a developer who constructed a residential development next to a feedlot and then subsequently filed a private nuisance action seeking to enjoin the feedlot from further operation. The court found that while prior to construction of the residential development the feedlot was a lawful operation, after development the feedlot constituted a nuisance and therefore must be moved, i.e. abated. However, the court also ordered the developer to pay the cost of removing the nuisance. The court wrote: "It does not seem harsh to require a developer, who has taken advantage of the lesser land values in a rural area as well as the availability of large tracts of land on which to build and develop a new town or city in the area, to indemnify those who are forced to leave as a result." *Id.* at 708 (emphasis added). This language suggests a reading of *Spur* in terms of restitution or unjust enrichment.

a "restorative restitution paradigm"²²⁶ that is applicable to contaminated property and that would support a claim by a buyer to recover cleanup costs prior to remediation. "[T]he question of who should abate a hazard is distinct from who should pay for the abatement . . ."²²⁷ Where one party "must abate a nuisance over which it has control, it is entitled to restitution from another party whose actions created the need for abatement."²²⁸ Thus, in applying restorative restitution to a buyer-seller situation, the buyer should abate the pollution because, as the current landowner, the buyer is in the best position to do so. The cost of abatement, however, should be borne by the seller, who created the nuisance. Application of restorative restitution principles to a buyer-seller situation would permit a declaration of rights and liabilities prior to cleanup.²²⁹

One final problem a buyer seeking an action in quasi-contract may encounter is measuring the benefit conferred upon the seller. A plaintiff's recovery in restitution is measured by the defendant's enrichment; thus, a buyer's recovery is limited to the extent by which the buyer has conferred a benefit upon the seller. When a buyer discharges a seller's statutory duty to clean up conveyed property, enrichment should be measured by the cost of cleanup that the seller would have otherwise borne.²³⁰

A more difficult task of measurement arises where the seller does not have a statutory duty to clean up the property, but the buyer's cleanup of the property forecloses the risk of future tort actions against the seller pursued by the seller's former neighbors. The benefit, in this instance, should be measured by the amount in which the seller would have been liable to neighbors; that is to say, the benefit equals the value of the neighbors' damages or injuries. Here, two potential measurements of benefit exist. One measure of benefit is based on the cost the seller would have incurred if the seller had cleaned up the property to avoid liability to neighbors. Another measure is based on a bargain theory that the benefit is equal to the value of an agreement between the seller and a neighbor, permitting

See R. Lisle Baker, *Recovering Privately and Publicly Conferred Windfalls—An Exploratory Essay*, 13:2 URB. LAW. vii (1981).

226. Baker & Markoff, *supra* note 155, at 120.

227. *Id.*

228. *Id.*

229. Although the principles appear sound, the author has been unable to find a single reported case in which the concept is examined. Further, no reported Florida case has relied upon *Spur*. Consequently, it is unclear whether a Florida court would adopt the restitutionary principles found in *Spur*.

230. See *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 194-95 (1967); *United States v. Reserve Mining Co.*, 408 F. Supp. 1212, 1213-15 (D. Minn. 1976); *Variety Children's Hosp. v. Vigliotti*, 385 So. 2d 1052 (Fla. 3d DCA 1980).

the continued existence of the pollutants. In an efficient market, the bargain-based benefit may be measured by the extent to which the neighbor's property value decreases.²³¹

IV. CONCLUSION

The Florida Statutes do not expressly provide an owner of contaminated land with a statutory cause of action against a contaminator.²³² Nor have the Florida courts read a cause of action into the statutes.²³³ Although there are provisions contained within the statutes that do not prohibit a person from bringing a private cause of action,²³⁴ this article demonstrates that few, if any, remedies currently are available to an innocent purchaser of contaminated land under Florida case law.

The Florida Legislature created the Inland Protection Trust Fund to expedite the cleanup of petroleum contaminants, and until recently, the fund provided an innocent purchaser of contaminated commercial land a measure of comfort—the land was cleaned up and the state was left with the responsibility and cost of sorting out fault.²³⁵ In light of the Trust Fund's financial troubles, landowners across the state are faced with the uncertainty of when, if ever, they will receive monetary assistance to underwrite the cleanup of their property. Moreover, those landowners who wish to clean up their property and seek out predecessors-in-title who were at fault have neither state statutes nor case law to lend support to their underwriting campaign. Until the Florida Legislature settles the future of the Trust Fund, lawmakers should provide an express statutory provision to assist those landowners who wish to pursue reimbursement of their

231. DOBBS, *supra* note 123, views the measuring of restitution as one of its chief problems. *Id.* at 379. Valuation problems in restitution are beyond the scope of this article, and the reader should consult DOBBS, *supra* note 123 and PALMER, *supra* note 116, for further discussion on the topic.

232. Current federal environmental law provides a private cause of action to an owner of land contaminated with hazardous waste. See 42 U.S.C. § 9607(a)(1988 & Supp. V 1993). Aggrieved landowners have applied this section to recover from adjacent and contemporaneous landowners as well as from predecessors-in-title. Further, federal courts have refused to apply the doctrine of caveat emptor to these cases. See *Amland Properties Corp. v. ALCOA*, 711 F. Supp. 784 (D.N.J. 1989). However, it must be noted again that petroleum is expressly excluded from the scope of CERCLA. In addition, in crafting what is essentially Florida's equivalent of CERCLA, the Florida Legislature distinctly omitted the private cause of action provision. § 403.727(4), FLA. STAT. (1993). The Florida Legislature created the Inland Protection Trust Fund to pay for cleanup of petroleum-based contamination. § 376.3071(2), Fla. Stat. (1993). However, the Trust Fund was put on hold during the 1995 Legislative session until lawmakers can resolve the funding dilemma facing the fund. See *supra* note 17 and accompanying text.

233. See *Mostoufi v. Presto Food Stores, Inc.*, 618 So. 2d 1372 (Fla. 2d DCA 1993).

234. See § 376.313, FLA. STAT. (1993).

235. See *supra* notes 11-16 and accompanying text.

cleanup costs from the party at fault. Until lawmakers act, however, a buyer of contaminated commercial property in Florida should not forego common law tort actions as a means of recovery and should continue to press the Florida courts to revisit their previous decisions.

Notwithstanding current Florida case law, an owner of contaminated land should not overlook the potential for recovery in fraud or strict liability. The rule announced in *Futura* and the court's reading of *Johnson v. Davis* with respect to a seller's duty to disclose is not only based on dicta,²³⁶ its soundness has not been sufficiently examined.²³⁷ The Florida courts should revisit the *Futura* decision to examine not only the shortcomings of the court's logic,²³⁸ but the effect a rule of non-disclosure has on the commercial real property market²³⁹ and on state environmental policy.²⁴⁰ Further, in light of

236. The *Futura* court reasoned that since *Johnson v. Davis* does not cite to any commercial real property cases, the *Johnson* court intended to exempt sellers of commercial transactions from having a duty to disclose material facts affecting the value of commercial property. It is bewildering to this author that no one has challenged this potentially incorrect inference. Accordingly, the issue may be subject to further scrutiny by the courts.

237. See *supra* notes 98-115 and accompanying text. While not specifically referring to the *Futura* decision, the court in *Haskell Co. v. Lane Co.*, 612 So. 2d 669 (Fla. 1st DCA 1993), criticized the distinction that is made, with respect to a duty to disclose, between residential and commercial real property transactions:

Many of the policy considerations used to justify a duty to disclose in residential cases apply with equal force to commercial cases. Is it reasonable to assume that a prospective buyer (or lessee) of commercial property is significantly more likely to be capable of examining the property to determine whether hidden effects exist than is a prospective buyer (or lessee) of residential property? . . . Such distinctions may have some merit as to the large corporate purchaser (or lessee), but clearly are inappropriate with regard to a substantial segment of the business community. "Courts should not assume that there is a relevant distinction between purchasers who invest in commercial property and 'simple, gullible folks unable to protect themselves.' People who buy [or lease] real property for business purposes vary widely in their experience, knowledge, sophistication, bargaining power, wealth, and access to outside advisers and experts." (citation omitted) Moreover, the buyer (or lessee) of commercial property has the same reasonable expectations as does the buyer (or lessee) of a residence—that he or she will receive what was bargained for, and be able to use it for its intended purposes.

Id. at 675-76.

238. At the very least, the court should construct an exception to the rule and require disclosure of pollution problems. See *supra* notes 113-114 and accompanying text.

239. Permitting a seller of commercial property to be shielded from liability behind the doctrine of caveat emptor may hinder the alienability of commercial property. See Judith G. Tracy, *Beyond Caveat Emptor: Disclosure to Buyers of Contaminated Land*, 10 STAN. ENVTL. L.J. 169 (1991). Tracy argues that caveat emptor is impracticable in many complex commercial transactions and is better suited to "commonplace market transactions in which both buyer and seller have equal access to information and are at equivalent bargaining strength." *Id.* at 172. Many commercial land transactions may involve hazardous materials, the presence of which may be known only by the seller and often incapable of detection by the buyer; consequently, the parties do not operate on a level playing field with respect to information. *Id.* Application of caveat emptor to commercial transactions may unnecessarily drive up transaction costs as

the New Jersey Supreme Court's affirmance of the restitutionary principle,²⁴¹ aggrieved buyers of contaminated land should press the Florida courts to reexamine the *Futura* court's rejection of strict liability in favor of a buyer of contaminated commercial property. The courts should not yet foreclose tort as a source of relief to a buyer of contaminated property. In addition, aggrieved buyers also should continue to urge the Florida courts to reassess their prior positions in light of economics and state environmental policy, and to adopt additional tort protection for a buyer.²⁴²

In the meantime, restitution may provide relief to a buyer of contaminated commercial property. A buyer who learns of the presence of contaminants after the conveyance may seek to rescind the transaction on the basis of mistake. Further, substantive restitution principles may also provide relief to a buyer. If there is a state statute imposing a duty upon the seller to clean up the contamination, a buyer who discharges this duty confers a benefit upon the seller. To the extent the buyer did not act as a volunteer, but rather acted in the buyer's own interests or in those of a third party, restitution views the enrichment of the seller as unjust, and the court should order the seller to disgorge the benefit. Further, an application of restorative restitution principles may permit a buyer to recover prior to performance of the seller's statutory duty, and thus avoid having to finance the cleanup prior to recovery in unjust enrichment.

buyers spend dollars for environmental studies. Moreover, contamination may escape detection, notwithstanding the performance of an environmental study upon the property, and saddle a buyer with unbargained-for future liability. In sum, the transfer of commercial real property is frustrated not only because of increased transaction costs but because of the potential risk of future liability. From an economic standpoint, to the extent the rule of non-disclosure precludes the transfer of property into hands capable of maximizing the property's aggregate social utility, society suffers.

240. If disclosure on the part of the seller were required, dollars spent on trying to level the playing field might be better spent on cleaning up the contamination in the first instance. Thus, to the extent that resources are unnecessarily diverted from the cleanup of contamination to site investigations for the benefit of a buyer (because a seller has no duty to disclose contaminants), environmental policy is thwarted.

241. *T & E Indus. v. Safety Light Corp.*, 587 A.2d 1249 (N.J. 1991). See *supra* notes 78-87 and accompanying text.

242. Justice Cardozo wrote:

[W]hen a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment . . . Perhaps we should do so oftener in fields of private law where considerations of social utility are not so aggressive and insistent. There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the year.

BENJAMIN CARDOZO, *NATURE OF THE JUDICIAL PROCESS* 150 (1921).

If the Florida courts adopt either tort or restitution principles to hold a seller of contaminated commercial property responsible for compensating a buyer, more information should flow into the marketplace as parties seek to meet their obligations to disclose and thus to avoid litigation. Ideally, the growing pool of information would remove or diminish "external diseconomy" or "market distortions"²⁴³ and permit resources that are otherwise unnecessarily absorbed in a distorted market to be used to clean up contaminated property.

243. When a market under or over-buys based on an incorrect accounting of true costs, the market is said to be distorted. To the extent a market is distorted, "[s]ociety, by allocating resources in one market incorrectly, loses the opportunity to use them in another." Michael Andrew O'Hara, *The Utilization of Caveat Emptor in CERCLA Private Party Cleanups*, 56 LAW & CONTEMP. PROBS. 149, 165 (1993). O'Hara's article presents an interesting twist on the argument that failure to disclose contaminated property creates a distorted market. He points out that private party actions under CERCLA and the rejection of caveat emptor as a seller's defense creates the potential for "doubly" distorted markets. That distortion occurs to the extent that a buyer acquires contaminated property at a price reflecting the presence of the pollution and then subsequently pursues a CERCLA action to underwrite the cleanup of the property. *Id.* at 149. See also Barbara Ann White, *Economizing on the Sins of Our Past: Cleaning Up Our Hazardous Wastes*, 25 Hous. L. REV. 899, 916-17 (1988).

